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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

NO. 75-953

CHARLES BEN HOWELL ..... *Petitioner*

v.

CLARENCE JONES, SHERIFF,
DALLAS COUNTY, TEXAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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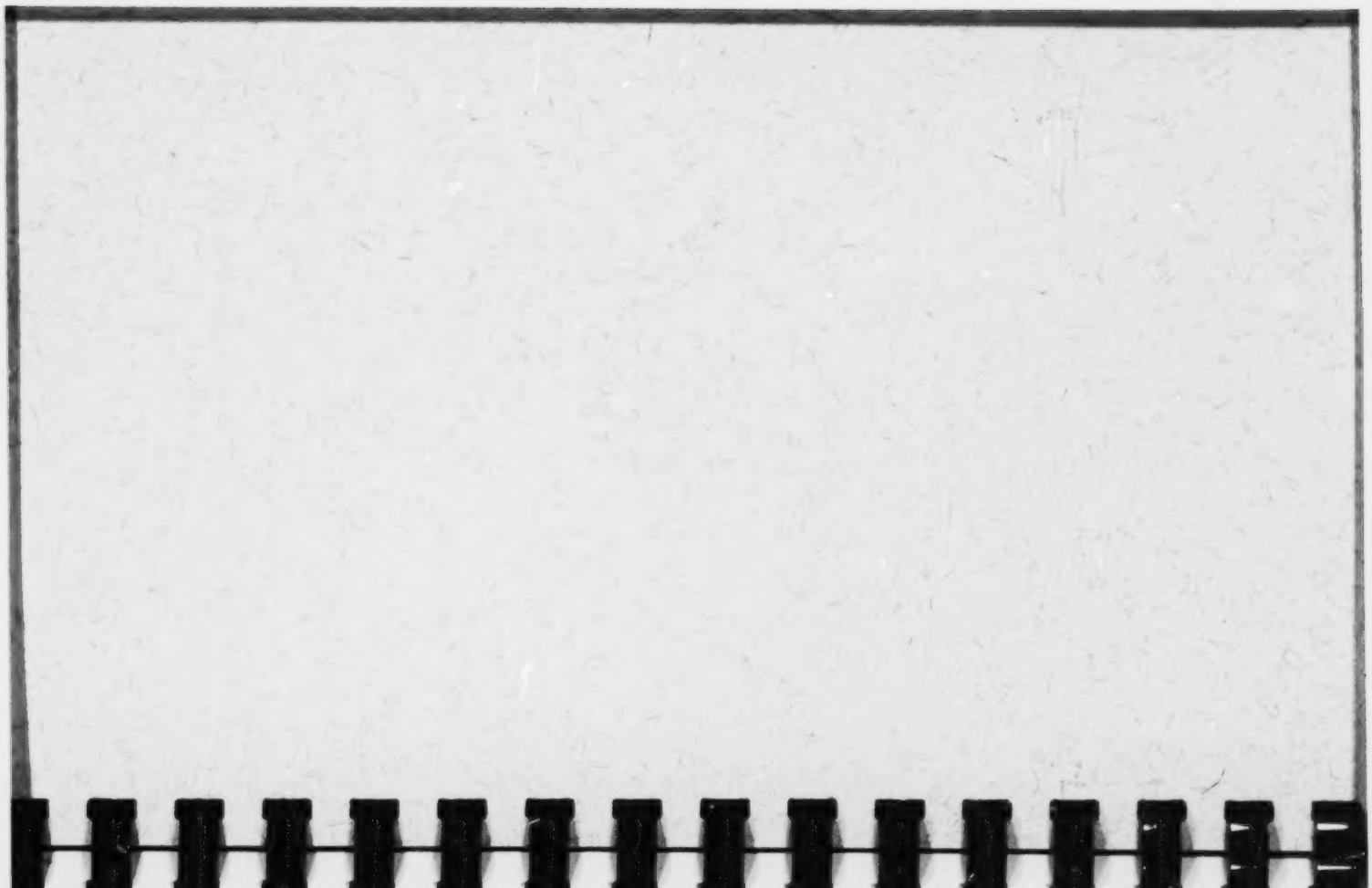

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

NO. 75 ——

CHARLES BEN HOWELL ..... *Petitioner*

v.

CLARENCE JONES, SHERIFF,
DALLAS COUNTY, TEXAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Charles Ben Howell, complains of the respondent, Clarence Jones, Sheriff, Dallas County, Texas and petitions for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgments and orders entered in that Court in its Cause No. 74-2292 where this petitioner was petitioner-appellant and this respondent was respondent-appellee.[1]

[1]Unless otherwise indicated, all emphasis has been supplied by petitioner.

Opinions Below

Following is a listing of all formal opinions regarding this case in the federal and state courts together with dates, publication data and references to the petitioner's appendix where the same may be found.

United States Court of Appeals, Fifth Circuit, July 16, 1975, 516 F.2d 53 (P.A.30-41).[2] United States District Court, Northern District of Texas, Dallas Division, November 30, 1973, unpublished (P.A.27-29), opinion on rehearing, March 1, 1974, also unpublished (P.A.29-30). Court of Criminal Appeals of Texas, November 15, 1972, 488 S.W.2d 123 (P.A. 17-23).

Jurisdiction

The judgment of the Court of Appeals was entered on July 16, 1975 (P.A.30). The Court of Appeals extended the time to petition for rehearing until August 29, 1975. A petition for rehearing was filed on August 28, 1975 and was denied on October 6, 1975 (P.A.42). This petition is being filed within 90 days thereafter. The jurisdiction of the Supreme Court is invoked under 28 *U.S.C.*, §1254(1).

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[2]In referring to the record of proceedings in the court below, petitioner will employ the following abbreviations: (P.A.) — Petitioner's Appendix attached to the rear of this petition, (J.A.) — Joint Appendix filed with the Clerk of the Fifth Circuit, (R.) — Record of Proceedings prepared by U.S. District Clerk, Northern District, Texas. It should be noted that many of the papers from the latter court are copies of court papers originally filed elsewhere.

Questions Presented

QUESTION ONE:

Did the Court of Appeals err in holding that the ex parte communications between the complaining judge, the special prosecutor and the trying judge do not present any question which rises to the constitutional level?

(1) Did the Court not *mislay the burden of proof?* Does not this type of incursion upon the right to an impartial tribunal fall under the automatic reversal rule? Alternatively, is the prosecution not burdened to prove the contacts harmless beyond a reasonable doubt?

(2) Did the Court not *apply the wrong test* in its necessarily implied holding that the complaining party must prove that the decision maker was *actually influenced* by the ex parte contacts complained of?

(3) Because of the conduct of the trying judge in first participating in an ex parte conference regarding the case, in secondly inviting and considering a memorandum from the opposing party, in thirdly giving his ruling only to the opposition and fourthly in proceeding to trial without disclosing that he had received and participated in such ex parte contacts, was the petitioner not deprived of his Due Process right to a trial before a tribunal *impartial in appearance as well as in fact?*

(4) Because of the foregoing and because of the fact that the trying judge gave his opinion on the vital burden of proof issue only to the opposing side, was petitioner not deprived of his Sixth and Fourteenth Amendment rights to a *public trial?*

(5) Because of the foregoing and also because of the accompanying suppression of evidence favorable to the

defense thus depriving the right of confrontation and cross-examination thereon, was the petitioner not deprived of his Fourteenth Amendment right to an *essentially fair trial?*

(6) Inasmuch as the "Declaration and Certificate" of the complaining judge was accepted by the trying judge as "the primary fact finding" shifting to petitioner "the burden of going forward" to "rebut the determination" thereof, was petitioner not *tried in part and in the first instance by a disqualified judge*; to-wit, his accuser?

Summary under Question 1 *begins at page* 7, *discussion begins at page* 24.

QUESTION TWO:

Has the *Hawk* rule, which requires that a state prisoner exhaust any available right of appeal to the Supreme Court before bringing habeas in the U.S. District Court, been overruled either by *Fay v. Noia* or any subsequent case?

(a) If the *Hawk* rule still prevails, has petitioner been foreclosed from prosecuting this habeas action on account of his prior filing of a jurisdictional statement with the Supreme Court which he was forced to do in order to comply with said *Hawk* rule?

(b) Assuming on the other hand, that the *Hawk* rule is no longer in effect; was the procedural law existing at the time that petitioner filed a jurisdictional statement with this Court sufficiently uncertain that petitioner should have relief under the rule stated in *England v. Med. Exrs.*?

Summary under Question 2 *begins at page* 12, *discussion begins at page* 68.

QUESTION THREE:

Does a summary order of the Supreme Court, rendered only on the basis of a jurisdictional statement, constitute the *plenary federal judicial review* to which a state prisoner is entitled upon a writ of habeas corpus?

(a) When the Supreme Court summarily dismisses a jurisdictional statement, what, if anything, has been "actually adjudicated" for the purposes of §2244(c) of the Judicial Code?

Summary under Question 3 begins at page 12, discussion begins at page 68.

QUESTION FOUR:

Is the Texas Criminal Contempt Statute void as repugnant to the provisions of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution upon any of the following grounds:

(1) That the statute, as construed, provides that the defendant shall be "held in contempt" by the complaining judge and provides that the other judge shall determine if the defendant is "actually guilty," thus *allowing the complaining judge to participate* in the process of determining "guilt or innocence."

(2) That the statute by its plain terms only provides for the calling of another judge to determine "guilt or innocence," thus *leaving punishment in the hands of the complaining judge.*

(3) That the statute denies the Equal Protection of the Laws in that it affords a *more favorable procedure for the trial of one class of criminal defendant* (an offi-

cer of a court) and thereby discriminates against other citizens, including petitioner, insofar as he does not come within the privileged class.

(4) That the statute does not provide for *jury trial*, accorded to all other citizens of Texas accused of crimes with penalties of similar gravity; thus, depriving petitioner of the *Equal Protection of the Laws and Due Process as well.*

(5) That the statute does not provide for *appeal*, a right accorded to all other citizens of Texas accused of crimes with penalties of similar gravity; thus, depriving petitioner of the *Equal Protection of the Laws.*

(6) That the statute, as applied and as construed, is unconstitutionally vague and overbroad in that it directly *tends to stifle zealous advocacy* and thereby deprives the Right of Petition, guaranteed by the First and Fourteenth Amendments.

(7) That the statute, as applied and as construed, is unconstitutionally vague for *failure to define petitioner's conduct as criminal or to warn* that he was subject to criminal sanctions for the manner in which he sought to advance the interest of his client.

Summary under Question 4 begins at page 17, discussion begins at page 110.

Constitutional Provisions, Statutes and Rules Involved

The following constitutional provisions, statutes and rules are involved. The text appears in petitioner's appendix (P.A.43-48):

The United States Constitution, Amendment Six

The United States Constitution, Amendment Fourteen, Section 1

28 U.S.C., §1257(2)

28 U.S.C., §2244(c)

Art. 1911a, Tex. Civ. Stats.

Art. 1911, Tex.Civ.Stats.

Texas Constitution, Article I, Sec. 10.

Tex. Code Crim.Proc., Ch. 45, Art. 45.25

Tex. Code Crim.Proc., Art. 4.03

Tex. Code Crim.Proc., Art. 4.08

Tex. Code Crim.Proc., Art. 44.02

Tex. Code Crim.Proc., Art. 44.17

Summary of Argument

QUESTION ONE:

PETITIONER DID NOT RECEIVE A FAIR AND PUBLIC TRIAL BEFORE AN IMPARTIAL TRIBUNAL

Somehow, the Fifth Circuit failed to comprehend the entire thrust of the appeal laid before it. Petitioner tucked the constitutionality of the statute into the back of his brief in an effort to emphasize what he sees as the overriding issue — those conferences and communications between the trying judge, the Honorable Louis T. Holland, the complaining judge, the Honorable Dee Brown Walker, and the special prosecutor, Mr. Coleman. The first, second, fourth, ninth and tenth points of error submitted to the Fifth Circuit all involved ex parte communications. The argument

thereunder took over half the brief. But, the Court chose to dismiss the matter in two short paragraphs.

The Fifth Circuit did confirm, however, that "before the hearing, the two judges did meet to discuss the effects of the new contempt statute on Howell's case" (P.A.36). In its unpublished opinion, the District Court only went so far as to state: "some discussion between the two judges *may have occurred*" (P.A.27). The Texas Court of Criminal Appeals preferred to let the matter go by entirely sub silentio (P.A.17-23)[3] Petitioner suggests that the reluctance to discuss matters pertaining to the disqualification of judges does not, in the long run, improve the stature of the judiciary, either in the eyes of the bar or the public at large.

The letter from Judge Walker to Judge Holland, reproduced on pages 28 A-B herein, is the "hard evidence" of ex parte communications, but it is not the only evidence. Judge Holland sat down to a one-sided pre-trial conference with Judge Walker and the special prosecutor. Inasmuch as Petitioner was not privileged to know that the meeting had even occurred, much less to participate therein, he cannot recount what transpired except by questioning those who were present, and they disclaim the ability to recall particulars. They do concede that the meeting took place and that the discussion centered upon this case. Furthermore, Judge Holland concedes that he privately ruled in

[3]While petitioner's evidence was incomplete when he was before the State Court, he filed an affidavit with the Court urging that he had obtained a glimpse of a letter from Judge Walker to Judge Holland, a copy of which was in the possession of the prosecutor (J.A. 164). He urged by his points 6-A and 6-B that Judge Holland became disqualified by failing to disclose that he had "received from the complaining witness a communication relating to the said contempt case" (J.A. 184). The State Court did not order production of the document and in the preparation of its opinion either overlooked the matter or decided that it was unworthy of mention.

favor of Judge Walker upon the vital burden of proof issue. That is to say, Judge Holland advised Judge Walker that Judge Walker "needed to *make his own findings* and *set his own contempt fine* and then it would be up to the new judge to *review* that and *tell him whether or not it was an abuse* or whether it was justified" (J.A. 279).

Can there be any dispute? The conduct of the trying judge, the Honorable Louis T. Holland, was improper. He was in breach of every code of judicial conduct of which we have ever heard. We think the Fifth Circuit clearly erred in the following respects:

(1) The Court was of the opinion that ex parte communications must be dismissed as harmless unless the complaining party can show "that they had any effect on the trial judge's determination" (P.A.36-37). This is an impossible burden. We cannot conceive hypothetically how an offended party can ever make proof that the judge was actually influenced by what he learned ex parte. The Court in effect has held that there may be no relief from this type of judicial impropriety.

(2) The Court has further mislaid the burden of proof. "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt," *Chapman v. Cal.*, 386 U.S. 18 (1967). The burden falls upon the prosecution to make such a showing. Further, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Examples given: coerced confessions, denial of counsel and *denial of an impartial judge. Chapman* relied on *Tumey v. Ohio*, 273 U.S. 510, 535 (1927): "No matter what the evidence was against him, he had the right to have an impartial judge." Surely,

the Court erred in applying harmless error to the present case.

(3) At a minimum, the burden falls upon the prosecution to prove that the communications, including the conference, were harmless beyond a reasonable doubt. This burden, it is wholly unable to discharge because all three participants insist that they have little or no recollection of the discussions had.

(4) Nor do we agree with the Fifth Circuit that the communications merely "involved trial procedure." Judge Walker urged that his "Declaration and Certificate" (P.A. 1-13) was "the primary fact finding" and that petitioner was burdened "to rebut the determination heretofore made." Burden of proof is a matter of constitutional dimension, *Armstrong v. Manzo,* 380 U.S. 545 (1965), *Mullaney v. Wilbur,* 421 U.S. 684 (1975).

(5) Nor may the self-laudatory statements about a "long suffering Court" and "every privilege we can envision" be overlooked. T he only possible raison d'etre was to solicit the sympathy and pre-disposition of the trying judge. What other earthly reason can be ascribed to their utterance? We ask: How many similar statements were made at the pre-trial conference? We were not privileged to be present, and those present either cannot or will not say. It is suggested that if one statement can be proved, others have been conveniently forgotten.

(6) Was petitioner not entitled to notice that Judge Walker was contending that the burden of proof had shifted? Did not Judge Holland's willingness to entertain this contention *ex parte* cast the shadow of doubt upon his impartiality? Even further, was petitioner not entitled to the benefit of Judge Holland's private ruling that, in essence,

he thought Judge Walker to be correct? How could a fair trial ensue when the trying judge rules ex parte and fails to notify the defendant of the burden being imposed?

(7) There are numerous decisions from lower courts dealing with ex parte communications and they are uniformly condemned. "Surreptitious efforts * * * eat at the very heart of due process * * *," *WKAT v. FCC*, 296 F.2d 375 (1961). The Supreme Court has often emphasized the due process right of an impartial tribunal but *it has never specifically considered the effect of ex parte communications.* We suggest this case as an appropriate vehicle to explore the obligations and responsibilities of a judge who receives, entertains or undertakes ex parte discussions concerning a pending case.

(8) Petitioner urges that the only way to curb ex parte communications is to hold that the judge has a duty to disclose. This is the essence of the Court's ruling in *Commonwealth v. Continental,* 393 U.S. 145 (1968). Please bear in mind that contacts of this sort are always carried out, and purposely so, in a manner calculated to keep the other side from ever knowing that they happened at all. Evidence of the nature and extent of the occurrence may only be obtained by raiding the enemy camp. It is rare that more than the tip of the iceberg can be uncovered.

(9) The Fifth Circuit has imposed a requirement, wholly insurmountable, of showing that the tribunal was actually influenced. It is impossible to open up Judge Holland's mind and determine if he was influenced. What petitioner can show is that secret hearings and secret proceedings of any kind are plainly unconstitutional and violative of the public trial provisions of the *Sixth Amendment.* The Constitution requires a charge "fairly made and

fairly tried in a public tribunal," *In re Oliver,* 333 U.S. 257, 278 (1948). If the high courts of our nation take a pish and tush attitude toward this sort of thing, it will continue to go on. The only effective way to keep trial judges from talking out of school to other judges, complainants, witnesses and who knows whom, is to overturn cases wherever this sort of thing is found to occur. It is the only means to keep our legal system pure.

(10) Those who would make such contacts must bear the burden to demonstrate that they were "at most, remote, peripheral, superficial or insignificant," *Stevens v. Rytex,* 340 N.Y.S. 933, 938 (dissent) (A.D. 1973), affd. 312 N.E.2d 466 (N.Y. App. 1974). Putting the burden on those who participate is the only means by which an aggrieved party may ever hope to obtain relief from this invasion of his right to a fair and open hearing before an unbiased tribunal.

QUESTIONS TWO & THREE:

THERE HAS BEEN NO PLENARY FEDERAL JUDICIAL REVIEW OF THE STATUTORY CLAIM

If an appeal to the Supreme Court is available, does the exhaustion rule declare that it must be exercised prior to a habeas petition? For many years the answer was undoubtedly "yes" - - - "including all * * * remedies * * * in this Court by appeal * * * have been exhausted." *Ex parte Hawk,* 321 U.S. 114 (1944). Certiorari was excluded from the exhaustion rule by *Fay v. Noia,* 372 U.S. 391 (1963), but that decision was carefully drawn so as to overrule the exhaustion requirement only with respect to the previous requirement of a petition for certiorari. The requirement that an appeal be taken to this Court wherever available remains in effect.

The Supreme Court has never overruled the particular provision of the exhaustion rule holding that, wherever available, the right of appeal to the United States Supreme Court must be exhausted. The precise predicament of this petitioner is this: May he be denied the right of a federal habeas review for doing exactly what the exhaustion rule required him to do?

If the Court below be correct (and there are now rulings to the same effect in five circuits),[4] then it follows that unless the exhaustion requirement be relaxed, *a state's rulings on the constitutionality of its criminal statutes may never be reviewed except in the Supreme Court.* If the accused fails to exhaust by exercising his right to address the United States Supreme Court on appeal, he is barred from federal habeas. On the other hand, if he does exhaust, the Fifth Circuit below holds that the dismissal of his jurisdictional statement constitutes a ruling "upon the merits (P.A.34) that bars the lower federal courts from further examining the particular question. Heads — I win; tails — you lose. Ergo, state rulings upon the constitutionality of their own statutes are insulated from attack except in the Supreme Court.

The purpose of Congress in providing the right of appeal to the Supreme Court in limited instances cannot be doubted. Congress considered that certain classes of cases merited wider rights of review. *The inevitable result of the decision below is that the right of review in this special class of cases has been restricted instead of expanded.*

(1) Under *Fay v. Noia*, supra, a state criminal defendant simply complaining of unconstitutional proceedings must carry his case completely thru the state's appellate

[4]Also, certiorari has been denied on the point three times.

process. At that point, he has the option to apply for certiorari but he is not required to do so. If unsuccessful on certiorari, he may start over in the federal district court with a clean slate; the rulings against him count for nothing. His arsenal of remedies still available includes a full federal review in the district court and in the Court of Appeals and another application for certiorari in the Supreme Court.

(2) But, *Fay v. Noia* does not apply to the state criminal defendant who complains of an unconstitutional statute. After the state's highest court has ruled against him, he faces a completely uncharted path, but any direction he turns, he faces limitations that other state defendants do not encounter. If appeal still be required for exhaustion, he is limited to a remedy that demonstrably (as the statistics show) holds less promise than three tiers of federal habeas review. On the other hand, if the exhaustion requirement, with respect to available rights of appeal, be dispensed, but the potential appellant be put to an election of appeal or habeas but not both; *which is the precise ruling of the Court below,* the fact remains that he is still possessed of *one less remedy to pursue.* Where Congress intended a greater remedy, he has less.[5] Lastly, but perhaps most importantly, the law has created another trap for the unwary. Unless represented not only by a capable attorney, but by a specialist in Supreme Court practice, the defendant is likely not to find out until too late that, unlike other state criminal defendants, his right to federal habeas review has been forfeited.

The Fifth Circuit conceded that the effect of summary disposition in terms of stare decisis "may be arguable."

[5]Possibly, the defendant could ask only for certiorari when he is really entitled to proceed by appeal but such action cannot by definition constitute exhaustion of all available remedies "in this Court by appeal."

Placing reliance on cases and texts discussing the rule applicable to ordinary civil cases, the Court proceeded to decide that dismissal of a jurisdictional statement "for want of a substantial federal question unquestionably settles the issues presented as between the parties." Therefore, concluded the Court, summary dismissal "is an actual adjudication within the meaning of §2244(c)" of the Habeas Corpus Act (P.A.35).

The Court has overlooked the bedrock axiom that there is no res judicata in habeas. In the ordinary civil case, even the denial of *certiorari* settles the issues "between the parties." We cannot emphasize strongly enough the undeniable proposition that settlement of issues "between the parties" is part and parcel of the law of *res judicata.*

We respectfully present that the Fifth Circuit proceeded upon a false premise. If a summary order precludes subsequent habeas review, it operates through the law of *stare decisis* creating a binding *precedent* to be followed in every case. It does not operate through *res judicata* creating a rule of ordinary civil practice for the disposition of the particular claim "between the parties." Res judicata declares that an egregiously erroneous ruling prevails "between the parties." But, no ruling can stand as *stare decisis* if it is demonstrably incorrect. The false premise that in habeas, summary orders have any peculiar significance "between the parties" undermines the conclusion that Congress intended the term "actual adjudication" to include summary dispositions.

The Supreme Court has construed §2244(c) but one time, *Neil v. Biggers,* 409 U.S. 188 (1972). Surprisingly, the Fifth Circuit failed to discuss the implications of *Neil* even though petitioner argued it strongly. That case emphasizes that there is no res judicata in habeas, that the Great Writ

is to be construed in favor of personal liberty and that the objective of the statute was simply to screen out "senseless repetition" of patently unmeritorious claims.

Neil emphasizes that §2244(c) was not enacted as an exception to the fundamental principle that a criminal defendant is entitled to "*plenary federal judicial review*" of all constitutional issues in his case, *Fay v. Noia* supra, 424. We thus return to the fundamental question: If the jurisdictional statement of a criminal defendant be disposed summarily, has he been provided "*plenary federal judicial review*" of his claim? Petitioner urges that the only logical answer must be in the negative. Res judicata is inapplicable. Stare decisis is a flexible doctrine and must be applied in this instance either not at all or with full appreciation for the summary nature of the Supreme Court's prior ruling. Such is the only approach which will preserve the right of "*plenary federal judicial review.*"

Petitioner submits in the alternative that if the exhaustion rule no longer requires a petitioner to first invoke "remedies * * * in this Court by appeal," such change in the law had not been clearly spelled out on April 24, 1973 when petitioner filed his jurisdictional statement. Specifically, the law was not sufficient to clearly apprise him that he was thereby forfeiting the right to proceed by habeas. The law of procedure, particularly the law of habeas, should be free of such traps. The body of law then existing caused this petitioner to apprehend that he might be required by the exhaustion rule to exercise his right of appeal. Upon authority of *England v. Med. Exrs.*, 375 U.S. 411 (1964), he should not be penalized for so doing.

So that he may be provided with plenary federal judicial review, petitioner asks certiorari to review the correctness of the prior dismissal for want of a substantial

federal question. Certainly, the Supreme Court has the power to review its own prior ruling.

Or, if the Court so chooses, petitioner asks that he be permitted to file for rehearing out of time in the appeal case, No. 72-1448, that the previous dismissal order be set aside, that petitioner be allowed a voluntary dismissal in such case and that the present certiorari case be remanded to the Court of Appeals or the District Court with instruction that constitutional attacks on the Texas Criminal Contempt Statute be considered upon their merits, without reference to or reliance upon the prior dismissal by the Supreme Court.

QUESTION FOUR:

THE STATUTE DOES NOT MEET CONSTITUTIONAL MINIMUMS

(1) (2) Texas adopted a new criminal statute effective August 31, 1975 and petitioner's case was the first appellate review thereof. The statute provides for "determination of * * * guilt or innocence" by a judge "other than the offended court" (P.A.45), but it is at most ambivalent as to the mode of proceeding. It is entirely silent as to who shall impose sentence.

The Texas Court of Criminal Appeals could easily have held that the statute contemplates a conventional criminal trial based upon pleadings and notice with the prosecution burdened to rebut the presumption of innocence and prove all elements of the crime beyond a reasonable doubt. It could have held that sentencing is entirely within the province of the trying judge. It could have required that any rulings, orders, "Declaration" or "Certificates" of the complaining judge have no effect whatever other than

as a statement of charges to be proved. We urge that *Due Process will not accept less.*

However, the Court of Criminal Appeals opted in favor of a watered down concept of criminal trial. Held: The statute "did not alter the power" of the complaining judge to "find[s]" an attorney "guilty" - - - "and assess[es]" punishment. The Court thought the procedure to be constitutional because it provides for "readjudication" before the trying judge as to whether the accused is "actually guilty" pending which hearing, the sentence imposed is held in "abeyance" (P.A.19-23). This, we urge, is not a constitutionally acceptable procedure of criminal trial.

(3) Petitioner further submits that the statute is class legislation. Only attorneys are granted the right of recognizance and trial before another judge, thus denying the Equal Protection of the Laws to all others, including petitioner insofar as the Court of Criminal Appeals held that "he lost his status as an officer of the court" (P.A.21) when he became a witness on his own behalf. Petitioner suggests that this proviso was forced into the statute by the predominance of lawyers in the state legislature bent on securing special protection for themselves.

(4) (5) Additionally, the statute permits neither trial by jury nor an appeal from the judgment rendered. Even if not within the Due Process concept, these rights are protected by the Equal Protection Clause. Where the judge must act immediately there is reason to punish without jury trial but in this case, the Honorable Dee Brown Walker, the complaining judge, waited a year before proceeding. In Texas, no other class of criminal defendant is denied of these rights, even with respect to parking tickets and anti-littering laws. Certainly, this is a breach of the compelling

interest test. We think it also fails to comport with the rational basis test.

(6) (7) Lastly, but perhaps most importantly, the statute as applied to this petitioner is tainted by First Amendment overbreadth and is void for vagueness under the Fourteenth Amendment. At the time of the alleged misconduct, petitioner was exercising his client's right of petition protected by the First Amendment. Petitioner violated no specific and intelligible statute, rule or regulation. The Texas contempt laws have never been applied to conduct of this type. Never before has anyone been imprisoned for contempt solely based upon the conclusion that the offender was guilty of "fraudulent action" or "professional misconduct." Thus, there has been no narrowing interpretation of this most "ill-defined and elastic" of all criminal laws.

At the time of the offense, petitioner was fulfilling his function as an advocate. He was forced to rely upon his own judgment as to the proofs that must be presented because no statute, rule or regulation covered the matter. Even if it be granted that his judgment was defective, he may not be imprisoned for that defect. It has numerously been held that zealous advocacy may not be stifled through vague and erratic application of the contempt power. If such were permitted, the real victim would not be the individual lawyer; it would be our entire adversary system of trial.

Statement of The Case

Petitioner's first defense is that if he failed to make any disclosures required of him before taking this much litigated default judgment, it was because he misunderstood what was required of him by the law and that an

attorney seeking to advance the cause of his client may not be fined or imprisoned for mere errors in judgment.

His second defense is that he, the petitioner was at the time a candidate for public office, that after he withdrew the testimony in support of his request for a continuance, it became an immaterial question, that collateral impeachment is not allowed under Texas law, and that the only reason for pressing the question was an effort to embarrass and humiliate, not only petitioner but his associates.

Of primary interest to the Supreme Court is that petitioner has never been given the opportunity to present his defenses to an impartial tribunal.

For 21 years, the petitioner, Charles Ben Howell enjoyed a good reputation as a practicing lawyer. He had never previously been cited for contempt and there had been no disciplinary proceedings of significance against him (J.A. 82, 158).

On May 26, 1971, petitioner brought his divorce client before the Honorable Dee Brown Walker to obtain a default (J.A. 105-108). This default became a highly contested issue. Judge Walker numerously urged petitioner to set it aside by agreement because the opposing attorney "might get sued for malpractice." Petitioner replied: The Judge was asking disloyalty to the client; if the judgment was defective, the Court had ample power to set it aside; but if it was good, they would stand on it (J.A. 61-62, 160-161). On December 13, 1971, Judge Walker entered summary judgment setting the default aside (J.A. 63). In preparing for appeal, petitioner discovered that the Judge had caused two court reporters to certify documents *after* they had been filed (possibly, after judgment had been rendered on uncertified papers). Under the Judge's instructions, one

reporter backdated his certificate several months. This matter was brought out January 31, 1972 when petitioner presented a motion to delete these signatures (J.A. 63-64, 126-139, 79-81, 160-162). Motion overruled. On February 17, 1972 Judge Walker indicated for the first time that contempt proceedings were imminent (J.A. 72-73, 76-77). On March 3, he stated from the bench "I hold Mr. Howell in contempt of the Court for misleading me," but he relented and did not remand him into custody stating that "another judge" would be called (J.A. 19-21). He did not sign his "Declaration and Certificate of Contempt" until June 15 (P.A.5); it was not filed until June 28 (P.A.1).

The undisputed evidence shows that at the May 26, 1971 hearing, petitioner provided to Judge Walker a docket sheet bearing the signature and extensive notations by Judge Gibbs (J.A. 114-115) clearly indicating that Judge Gibbs had held proceedings and had taken action in the case and Judge Walker endorsed the default on the next line beneath. The apparent transcript (We say "apparent" because it was not certified in accordance with law and never offered in evidence) of this hearing (P.A. 6-13) indicates that petitioner stated to Judge Walker "They have been down here on temporary matters" (P.A.12) and further stated that the husband had a lawyer with him "on the temporary hearing" (P.A.12). This record further indicates that Judge Walker asked not one single further question about the temporary hearing or about actions taken or proposed by Judge Gibbs even though that docket sheet containing all those notations plus Judge Gibbs' own signature was laying before him. Petitioner contends that he was entitled to conclude and did conclude that Judge Walker had no further interest in proceedings before Judge Gibbs.

Petitioner further contends that Judge Walker was in a hurry and signed the judgment after making superficial inquiries and giving only the shortest amount of time for presentation of the case, all because "there will be a motion to set this aside" and because the opposing side "can file a motion" (P.A.12-13). In other words, Judge Walker treated the entire hearing in an abrupt and offhand manner because he fully expected to set the matter aside at a later date. However, for reasons unknown, the husband and his attorney failed to file a proper motion within the 30 day period allowed by law. Petitioner contends that when he refused to set the decree aside by agreement, Judge Walker became so upset that he altered the court's papers in order to establish a basis upon which he, Judge Walker might set the default judgment aside. Thereafter, when petitioner called Judge Walker's hand on the matter of altering court papers, Judge Walker retaliated by declaring petitioner in contempt. In short, petitioner contends that he furnished Judge Walker all of the information that Judge Walker desired to receive at the time of the default judgment and that the claim that petitioner omitted to furnish information to Judge Walker is a claim which was fabricated much later and which was born out of spite.

Hearing occurred on July 27, 1972 before the Honorable Louis T. Holland (P.A.14). Petitioner attempted to contend that the charges were motivated by spite and were being prosecuted to injure his candidacy in the upcoming November elections.[6] But Judge Holland refused to allow cross-examination on matters relating to credibility or bias and

[6]Petitioner was Republican candidate for another state court judgeship in an all Democratic courthouse. If the proceedings was politically oriented, it was successful. A number of Republicans carried Dallas County on November 7, 1972, but petitioner lost his race receiving 46.3% of the vote.

prejudice (J.A. 73-78). The Fifth Circuit found no error on the premise that "the inquiry did not go to the veracity of the witness's testimony concerning the events for which Howell was found in contempt" (P.A.37).

The Texas Court of Criminal Appeals denied relief on November 15, 1972 (P.A.17-23), and denied rehearing on January 10, 1973 (P.A.24). The Court cursorily held that the new Texas Criminal Contempt Statute, *Tex.Civ.Stats., Art.* 1911a (P.A.44-47) was not unconstitutional. Petitioner filed a jurisdictional statement with this Court, No. 72-1448, on April 24, 1973, which was dismissed "for want of a substantial federal question," *Howell v. Jones,* 414 U.S. 803 (1973) (P.A.24). Anticipating that respondent would contend that the Supreme Court's summary disposition precludes habeas relief, petitioner filed with the Supreme Court a motion to rehear, set aside its previous dismissal order and allow voluntary dismissal under Supreme Court *Rule* 60(2) (P.A.24-26) but the Supreme Court entered its order "Petition for rehearing and other relief denied", 414 U.S. 1052 (P.A.26).

On January 16, 1973, petitioner filed a petition for a writ of habeas corpus with the United States District Court, Northern District of Texas, Dallas Division, under the provisions of 28 *U.S.C.* §§2241-2254. The writ was denied on November 30, 1973 and the denial was affirmed by the United States Court of Appeals on July 16, 1975.

During the state court contempt hearing before the Honorable Louis T. Holland, petitioner accidentally learned that Judge Walker had addressed a personal letter to Judge Holland concerning the case, providing a copy to the prosecutor but no copy to the official files and none to petitioner (J.A. 260-261, 242, 268-269). Judge Walker refused petitioner's demand for the letter (J.A. 269), but the

U.S. District Court granted discovery of the letter and of discussions between the judges (J.A. 234). Petitioner asserts that he has been thereby deprived of his rights to a fair and impartial public trial before a fair and impartial tribunal.

Reasons For Allowing The Writ

QUESTION ONE:

PETITIONER DID NOT RECEIVE A FAIR AND PUBLIC TRIAL BEFORE AN IMPARTIAL TRIBUNAL

On March 3, 1972, while conducting a hearing regarding the Ralston divorce and without any prior notice, pleading or evidence (J.A. 312), Judge Walker stated: "I hold Mr. Howell in contempt of the Court for misleading me last summer" (J.A. 19). But, he relented from entering an immediate judgment. Mr. Howell asked: "As of now then there is no formal ruling, that's what I am asking?" The Court answered: "That's right." Judge Walker proceeded to state that petitioner was "entitled to have a different judge to pass on *the whole thing.*" Petitioner requested that "the entire matter of contempt" be heard at a single time with petitioner "given the opportunity to testify and produce witnesses." The Court replied: "You will have that." Petitioner further asked that "any ruling be deferred until such time at which the entire matter can be disposed of." Judge Walker replied: "You may have that." (J.A. 19-21).

No further proceedings were had until June 28 when Judge Walker served upon petitioner the first document of any kind pertaining to contempt entitled "Declaration and Certificate of Contempt" (P.A.1-13). Hearing was set for July 27 (J.A. 32) before the Hon. Louis T. Holland, a retired judge from Montague, Texas, about ninety miles

distant, who was apparently sitting in another Dallas courtroom during the week of July 10, 1972 (J.A. 234-41, 272-73).[7] During that week, a conference occurred in Judge Walker's office between Judge Holland, Judge Walker, and Mr. James Coleman, a local attorney whom Judge Walker, with the apparent acquiescence of Judge Holland, had selected to act as special prosecutor (J.A. 307, 309, 251, 257, 274-75, 279, 284-286, 288-289, 294). Little is known of the discussions because the three participants insist they have only the vaguest recollection, but there can be no doubt that the subject of the meeting was petitioner's upcoming trial. According to the depositions of the participants given to the federal court within eight months thereafter, (J.A. 234-296) the discussions centered around the construction of the new Texas Criminal Contempt Statute, *Article* 1911a, Tex. Civ. Stats. (P.A.44-47).

It appears that the three planned to meet again on July 13th but the second meeting never took place. At the original meeting, Judge Walker apparently undertook to prepare for Judge Holland's signature, a notice of hearing date (J.A. 263, 240). Judge Holland probably returned on Thursday, the 13th to sign this letter. He had concluded his assignment in the other courtroom and was anxious to return home. Apparently, neither Judge Walker nor Mr. Coleman was available but there was a brief discussion, in which Judge Walker promised that he and Mr. Coleman would prepare a memorandum and forward it to Judge

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[7] Q. And you live where? A. Montague, Texas.

Q. And your occupation for the Record, Sir? A. I'm a retired District Judge. * * *

Q. * * * do you from time to time substitute for the district judges of Dallas County, Texas? * * * A. Yes, Sir.

Q. And for the past year what would you say would be the average frequency that you've come to Dallas County to serve — A. — I have no idea, but frequently. (Judge Holland's testimony by deposition, U.S. District Ct.) (J.A. 272).

Holland. Judge Holland was unable to recall that he ever requested or expected any such memorandum (J.A. 276)[8] but Judge Walker testified to the contrary:

> "A. [Judge Walker] * * * Now, we were trying to get that out before he left here, but we couldn't do it. He

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[8]Judge Holland's entire deposition testimony was that he could recall very few particulars:

Q. Alright, Sir, and I'll ask you how many times you saw and visited with Judge Walker regarding the case prior to the date that it was tried? A. I have no idea. I didn't keep account. I'd meet him in the hall and maybe ask him when the case was going to be tried. I have no idea, I can't answer that question.

Q. But do you recall at least one visit to Judge Walker's office or his courtroom, would that be correct? A. I went down there at the outset when I was appointed to find out the general nature of the case.

Q. And would it have been on that occasion or a subsequent occasion when you were introduced to Mr. Coleman? A. Well, it was one or the other.

Q. And prior to the time you left Dallas on that visit how many times did you visit Judge Walker? A. Prior to the time, what?

Q. You stated, I believe, that when you first were appointed to try this contempt case that you went by to see Judge Walker or to find out the nature of the case? A. Yeah.

Q. And that you were in town on that occasion, one, two, three days, I believe, would that be correct? Something on that order? A. Yes.

Q. And I'll ask you how many times you saw or visited Judge Walker before you left town? A. I don't know, I couldn't answer that.

Q. And did you or did you not ask Judge Walker to mail anything to you on that occasion? Or before you left town? A. I think so.

Q. Alright. And what did you ask Judge Walker to mail you? A. Oh, send me a copy of the transcript, orders that he had entered, if any, so I could review it to see what the case was all about.

Q. Did you ask him to send you a memorandum regarding the facts of (Quare: or??) the law? A. No, I knew what the law was. I mean I had access to the law, same law as he did. It was in the book. It's a new law. * * * — Part of it was and part of it was the old law.

Q. And after you returned to Montague did Judge Walker send anything to you in the mail? A. Yes, that's what I'm telling you he sent me, he mailed it to me, he didn't have it then, he said he would have the transcript and he would send it to me. That together with an order that he entered, as I remember it he sent some sort of an order that he entered.

said '*Just send it to me.*' And Mrs. Elgan was working real hard trying to get it out. If you will recall —

"Q. Judge Holland knew * * * [it?] was coming? A. He knew * * * [it?] was coming. I told him I would get it to him the next day." (J.A. 251).

(Fn[8] cont.)

Q. And the papers which he sent to you you have them in your office in Montague? A. No. I haven't seen them since. They didn't mean anything to me. * * *

Q. And I will ask you if you received a letter from Judge Walker after you returned home? A. After, what?

Q. After you returned to Montague. This visit, what we will call the initial visit at the time you were — A. — I got this stuff from Judge Walker or his court reporter or stenographer or somebody sent it to me.

Q. Was there a transmittal letter in there? A. I don't know. I guess there was of some sort. It would have been proper, I think.

Q. And what other communications did you have from Judge Walker before the case came to trial? A. When I would see him from time to time, if then, I don't know any more.

Q. What other discussions did you have with Judge Walker about the case? A. None of any importance.

Q. What other discussions did you have with Mr. Coleman about the case? A. Was he the lawyer you were talking about?

Q. Yes, Sir. A. None. None that I remember.

Q. Have you had an opportunity to examine your records and check in your office for documents or papers that you might have regarding this contempt case that we're discussing? Have you had an opportunity? A. I haven't looked. I don't have any papers there concerning it except the order where you were held in contempt of court and the Court of Criminal Appeals — I've got that opinion in my office where the Court of Criminal Appeals affirmed my decision.

Q. Would you after you have returned home to Montague examine your records in your office or at your home, if you have any records at your home, and determine whether or not you do have any papers in your possession — A. — Let me answer you that now and I'll tell you no, as I don't keep things like that piled up around, I throw it away. I've got the opinion that Judge Morrison wrote in the case.

Q. And filed with that opinion do you have any other — A. — It's not filed it's laying on top of my desk or maybe in my brief case there, I don't know, I carry it along with me.

Q. And along with that opinion do you have any other typed papers or memorandums regarding the case? A. No, Sir.

Q. And your testimony is now that you just do not have them, you do not need to look you plain do not have them? A. I do not have them (J.A. 275-277).

The memorandum, or letter, here attached, is dated Friday, July 14, 1972. It is liberally sprinkled with the pronouns "we", "our", and "us". Judge Walker testified that the plural referred to himself and his reporter, Mrs. Elgan (J.A. 251), but the context and the depositions strongly indicate he was referring to himself and Mr. Coleman. At one point he inferred as much (J.A. 257).

Judge Walker urged that "*the determination of the Certificate of Contempt* is the primary fact finding." He contended "*probably the burden of going forward will rest on Charles Ben Howell to rebut the determination heretofore made.*" He stated that "*federal cases*" would "*indicate his right to a confrontation involvement.*" He stated that in his opinion, Judge Holland need receive only "*nominal testimony*" and "*consider what defense, if any, Mr. Howell has*" prior to entering a conviction.

The letter concluded with self-laudatory assurances that petitioner had received "every indulgence a long suffering court can give" and that the "spirit" exercised by the writer was "in vain." No copy of the letter was given to petitioner or filed with the official court papers, although a copy was provided to the prosecutor (J.A. 242, 268-269, 308). *Judge Holland proceeded to privately advise Judge Walker that he was substantially in agreement* with the complainant's contentions (J.A. 279-280); see discussion and quotation thereof under the sub-heading, "the trial was essentially unfair," infra. On the date set, Judge Holland appeared and proceeded to trial without informing petitioner of his negotiations with the other side. They came to light only by accident (J.A. 164). It took federal discovery to obtain the letter or to even know of the discussions had (J.A. 2, 15, 234).

DEE BROWN WALKER
JUDGE 162ND DISTRICT COURT
DALLAS, TEXAS 75202

PLAINTIFF'S EXHIBIT
3-9-77
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RR

July 14, 1972

Honorable Louis T. Holland
Box 57
Montague, Texas

EMPHASIS SUPPLIED BY PETITIONER

RE: No. 71-8259-DR/2
In the Matter of the Marriage of
Norman Clark Ralston and
Edna Dell Morgan Ralston

Dear Judge Holland:

Carefully reading Articles 1911 and 1911A, we are of the opinion that on our finding and declaration of contempt by Charles Ben Howell, we have presented a proper charge against him which he is entitled to have heard before a Judge other than the judge sitting at the time of the offense. The exact provision of Article 1911A that influences our judgment is Provision (c): "Provided, however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred."

It would seem that the obligation falls upon you to make a determination of guilt or innocence upon our Declaration and Certificate of Contempt and to assess a punishment. We have heretofore indicated that the first contempt falls within Article 1911, punishment for which is limited to $100.00 fine and 72 hours in the common jail as maximum penalty, and the second contempt is covered by Article 1911A effective August 30, 1971, authorizing punishment of not more than $500.00 or confinement in the county jail for not more than six months or both. We are sorry that we were not available at the time you left, and we believe that the enclosed copies provide you with the appropriate instruments upon which you should proceed. It is our understanding that the determination of the Certificate of Contempt is the primary fact finding, and that probably the burden of going forward will rest on Charles Ben Howell to rebut the determination heretofore

made. The cases do not resolve this matter for us, and I can cite you to no authority from my interpretation, but I am conscious of federal cases that would indicate his right to a confrontation involvement of the facts on a charge communicated to him and an adjudication and punishment after a trial on the charge. My understanding of the proceeding would be to confirm the Declaration and Certificate of Contempt by nominal testimony as to the facts upon which the Court has concluded contempt, and then consider what defense, if any, Mr. Howell has before adjudging him guilty or innocent and fixing his punishment, if any.

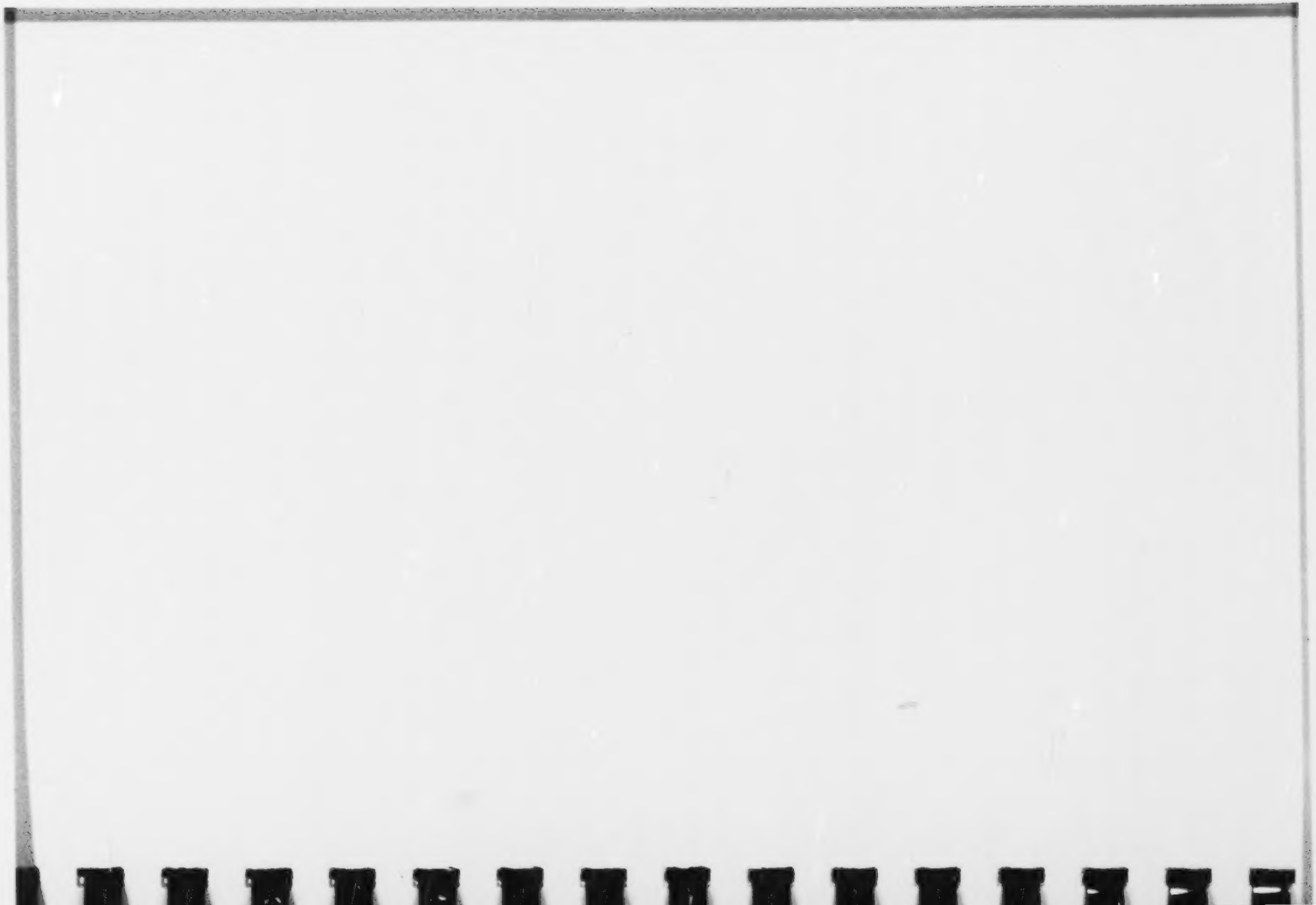
It has been our consideration that the monetary elements in this matter are of little significance in comparison to the other factors, and under these circumstances, we have on our own motion attempted to be extremely careful that Mr. Howell is accorded every right, every consideration and every indulgence a long suffering court can give to one of its officers in passing on the propriety of that officer's relation to his duty to the court. You will note that in this spirit in vain the determination to have a judge other than the offended presiding officer pass on the guilt or innocence of the contempt found and punishment, if any, therefor, was done on the Court's own motion as was the release of Mr. Howell on his personal recognizance until the matter could be adjudicated by a judge not heretofore participating in any of the proceedings. In a different situation, we might have proceeded to dispose of the matter more summarily, but under all of the circumstances, we have elected to accord to Mr. Howell every privilege we can envision he might have regardless of whether he has requested it or not.

Yours truly,

DEE BROWN WALKER
JUDGE OF THE 162ND JUDICIAL DISTRICT
COURT SITTING FOR THE DOMESTIC
RELATIONS COURT NO. 2 IN AND FOR
DALLAS COUNTY, TEXAS

[J.A.261]

R 1748



AS A RESULT OF EX PARTE COMMUNICATIONS JUDGE HOLLAND LOST HIS IMPARTIAL STANCE

It is fundamental that a judge must not only be impartial in fact, he must maintain an appearance of impartiality. "Justice must satisfy the appearance of justice." *Mayberry v. Pa.*, 400 U.S. 455 (1969). The appearance of impartiality has been described as the core of even-handed justice. The question is not whether Judge Holland harbored or displayed animosity toward petitioner[9] — the test is whether

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[9] This distinguishes the only case relied on by the Court of Appeals, **U.S. v. Grinnell,** 384 U.S. 563 (1966). That case was decided under a statute providing for disqualification of a federal judge upon the filing of an affidavit charging him with "personal bias." Because of their potential for mischief and the danger that they might be employed to cripple the orderly dispatch of business, these affidavits have always been closely construed.

Affidavits for disqualification almost always involve statements or expressions by the judge. The leading case holding an affidavit sufficient is **Berger v. U.S.,** 255 U.S. 22 (1921). If the affidavit reflects the judge's attitude is based upon or referrable to that which he has learned **through the conduct of the case,** it is usually held that the judge has evinced a low opinion of the case (not disqualifying) rather than a low opinion of the litigant as a person (disqualifying).

Grinnell does not involve ex parte communications topside or bottom. The alleged shortcoming of that judge was an intemperate manner and an indication that he had decided the case before the evidence was complete. We see no applicability to the case in hand. If the Fifth Circuit was of the opinion that disqualification may not be established without proof that the trial judge was actually possessed of **"personal bias,"** we submit that the Court was clearly in error.

Grinnell is based upon a federal procedural statute, not presently applicable. The long string of cases relied on by petitioner, primarily **In re Murchison,** 349 U.S. 133 (1955) and which the Court found "different" are based upon due process. In the **Murchison** line, the cases are unconcerned with the animus of the judge. They consider the circumstances, and if the circumstances show the absence of a judicial atmosphere or that the judge has engaged in partisan conduct, the judgment cannot stand. It is **Grinnell,** not **Murchison,** which is here inapplicable.

Petitioner does not charge Judge Holland with "personal bias" and it is unnecessary to do so under the **Murchison** line. Petitioner does submit that the Honorable Louis T. Holland did conduct himself in a manner that deprives him, his court and his judgment of the impartial stance that due process requires.

or not he exhibited partiality toward the prosecution. If so, the petition must be granted because trial before an impartial tribunal, being a tribunal both impartial in appearance and impartial in fact, is a fundmental requirement of due process.

Cases of ex parte communication with the decision maker come primarily from administrative tribunals where informality and the presence of laymen is more conducive to such contacts. In *Jarrott v. Scrivener*, 225 F. Supp. 827 D.C. D.C. 1964), the decision of the Board of Zoning Adjustment was "held to be null and void on the ground that the plaintiffs were denied a fair and impartial hearing:"

> "Plaintiffs claim that * * * during the course of proceedings, * * * all members of the Board were subjected to improper pressure by means of letters * * * and by oral communications, * * * made by * * * persons highly placed in the governments of the District of Columbia and the Executive Branch of the U.S. *Id.* 829
>
> "No record was made in the Board official file of these * * * conferences. [nor were the letters placed in the file] No reason has been given for failing to make a record of them. No reference to them was made at the public hearings before the Board. The interested parties objecting were in the dark so far as their existence is concerned.
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> * * * * * * * * *
>
> "What was said during these verbal contacts * * * can only be obtained from the lips of the interested parties themselves. Their testimony is to the effect that the person making the contact expected that the Board member would be dutiful in making his decision, but asked that he remember the national interest. The

similarity of language employed by these witnesses as to what was said might excite a degree of skepticism as to their unqualified dependability.

"The Board, * * * performs judicial functions in its narrow and specialized jurisdiction. * * * *The parties * * * involved are entitled to the same fairness, impartiality and independence of judgment as are expected in a court of law.*

* * * * * * * * *

"Did these secret, ex-parte contacts influence the * * * Board to such an extent that they impaired its independence of judgment and thus deprive plaintiffs of a fair and impartial hearing? *In a court of law the answer would undoubtedly be 'yes' without further ado.*

* * * * * * * * *

"Although the Board members denied being influenced by these contacts, and indeed one testified that he attached no significance to the letter of the Secretary of State, I am not required to give full and unqualified credence to such disclaimers, but should take them in the light of experience and take into account the frailities and infirmities of human nature. * * *

"The pressures were not crudely or indelicately exerted. * * * But the pressures were never-the-less real, and the Board members contacted could not fail to be aware that they would incur administrative displeasure. * * * Contacts of this kind, regretably, are not new. Some are the products of veniality and corruption. Those involved herein were not * * *. However, the end result is the same, and the technique does not vary greatly. It involves an assurance that there

is no thought of asking the person contacted to do other than his duty, followed by an expression of hope that his duty will incline him in the direction desired. In the vernacular * * * this insidious approach is known as the 'soft approach' or 'soft touch'.

"I therefore conclude that the ex-parte, secret contacts here were of a character which deprives plaintiffs of a fair and impartial hearing.

"Perhaps I should add that there might be room * * * for a different conclusion if these contacts, verbal and written had been recorded in the public file for all to see and for those who desired, to oppose, in the full glare of a public hearing. But that is not the instant case as no opportunity was afforded the opposition to rebut their impact upon the Board, having the power of decision. And it might not be amiss also to point out that *appearance of fairness and impartiality is probably of as great importance as its attainment if the public is to have confidence in the judicial processes.*"

In the case of *In re White,* 300 So.2d 420 (Ala. Cr. 1974), the Judge against whom disqualification was sought wrote a letter ex parte to the appellate court explained why he had fixed an unusually high bail bond in the movant's case and suggested that if a motion to reduce bail were filed, it should not be allowed. The movant also contended that this judge had acted in a heavy-handed manner in the separate trial of a co-defendant. Held: the judge was disqualified.

"In the English-speaking countries of the world there exists a well-recognized principle of law that every individual charged with the commission of a crime or misdemeanor shall, * * * be accorded a fair and impartial trial.

"This rule is basic in the Constitution of our United States * * *.

"Courts of last resort throughout the United States, over and over, have given emphasis to the importance of observing this principle.

* * * * * * * * *

" 'It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. * * * We can have no higher authority than this for denouncing as illegal everything which interferes with the entire impartiality of every legal tribunal.' " *Id.* 428-429

It was urged that all of the alleged misconduct occurred not in the trial of the movant but in the trial of a co-defendant and that the actions of the judge reflected no more than a conviction that the charges as alleged warranted stern punishment. Compare *Berger v. U.S.*, supra. The prosecution urged that the case was controlled by one of the Alabama court's prior authorities holding that if the expressions of a judge can be attributed to a stern view of the offense, there is no disqualification. The Court disagreed:

"* * * In the instant case, however, we have the letter, a substantial piece of *hard evidence* showing the requisite bias.

* * * * * * * * *

"The paramount distinction in these two cases, however, is that * * * [our prior case] does not contain any concrete evidence of the judge's personal interest as shown by the letter before us," *Id.* 433.

Respondent would undoubtedly attempt to distinguish *White* on the grounds that the judge in that case was the sender rather than the receiver of the letter in question. However, just as *White* urges, we urge that the entire circumstances must be considered.

Whether or not *White* presents a stronger case for disqualification begs the issue. Any line drawn between the cases saying that the judge in *White* went too far while the judge in *Howell* did not go far enough to disqualify, would be under all the authorities artificial in the extreme. Both cases clearly show the abandonment of an impartial stance, *the violation,* if you please *of the minimum standards of judicial conduct.*

Certainly, Judge Holland cannot be distinguished as a mere passive participant in the matter. In fact, some of Judge Holland's conduct goes much further than the conduct shown in *White.*

(1) Judge Holland willingly sat down to confer regarding the case, not only with the complaining judge but with the special prosecutor, holding a one-sided pre-trial conference.

(2) According to Judge Walker, (and Judge Holland's testimony on the point is most inconclusive) the letter was sent to Judge Holland by his invitation. "He said, '*just send it to me.*' * * * He knew * * * [it?] was coming" (J.A. 251).

(3) Having received the letter and its obvious attempts to pre-dispose him, the Hon. Louis T. Holland, against the accused, ("every indulgence" - - "long suffering court" - - "spirit in vain" - - "own motion" - - "every privilege") Judge Holland proceeded to take the bench and

conduct a trial all the while purposely omitting to disclose the receipt of that letter.

(4) But the evidence goes even farther. Judge Holland by his own testimony, quoted below, admits that he privately advised Judge Walker that he, Judge Holland, was substantially in agreement upon the contention that petitioner had, "the burden of going forward * * * to refute the determination" previously made by Judge Walker. Not only did the Honorable Louis T. Holland rule in favor of the opposition, he left petitioner in ignorance that the ruling had been made.

(5) We further present that Judge Holland's handling of bail bond matters and his conduct of the entire trial, as more fully discussed below, was more than a slight bit heavy handed.

White says that the total circumstances must be examined. The total circumstances in hand reflect clear impropriety, and a manifest lack of impartiality. If *White* be right, *Howell* is wrong.

In like manner, ex parte communications were condemned and the award held void in *WKAT v. FCC,* 296 F. 2d 375 (1961):

> "Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accordance with basic principles of our jurisprudence, eat at the very heart of our system of government-due process, fair play, open proceedings, unbiased, uninfluenced decisions." *WKAT v. FCC*, 296 F.2d 375 (1961).

In the *Jarrott* and *White* cases just discussed, the court emphasized that one party to the case had been made aware

of the ex parte communications but not the other, thus depriving the decision maker of that essential appearance of even handedness and detached neutrality. Again, in *Sangamon T.V. v. U.S.*, 269 F.2d 221 (C.A. D.C. 1959), the decision was overturned because of ex parte representations and letters to commissioners which did not go into the public record thereby depriving the opposition of an opportunity to contest the contentions made.

This petitioner was deprived of the valuable opportunity to contest assertions made by Judge Walker both in his letter and in the one-sided pre-trial conference, the nature and extent of the assertions made at the conference being a matter which all three participants are unable to recall except in generalities. The denial of the opportunity to contest was emphasized in *Lewis v. Guaranty Fed.*, 483 S.W.2d 837 (Tex. Civ. App. 1972, n.r.e.). In that case the savings and loan commissioner made an undisclosed field trip to inspect the facilities of only one of two competing applicants. Appropos to the case in bar, the professed inability of the participants to recall any but the vaguest outlines of the ex parte contacts was emphasized as depriving the opposition of a record for the purpose of appellate review. "If there was wrong doing, only the Commissioner, his Deputy or Tarpey are in position to disclose such contact." The Commissioner's duties were compared with those of "the judge of a court:"

> "Each is charged with the solemn trust to act fairly and impartially in fulfilling his vested duties * * * each must act with genuine even-handedness, compelled by a firm and continuous desire to render to everyone that which is due, and to shun any conduct tending to undermine faith and confidence in the man or the office

in which he acts. Caesar's wife * * * 'should be above suspicion.' "

Judge Walker, is of course, both a lawyer and a judge. *Root v. Universal,* 169 F.2d 514, 541 (3-Pa. 1948), involving a lawyer's attempt to influence the Court of Appeals is squarely in point.

"The reports do not disclose instances of the employment of a lawyer * * * only [in] the expectation that the attorney's personal influence with the judge would be exerted * * *. [However,] the courts have emphasized the correlative duty of the lawyer to depend solely upon the merits of his client's case and to abstain from all efforts to throw into the scales of justice his personal influence.

* * * * * * * * *

"The client * * * fares no better. * * * To him also the doors of the courts are closed. From the moment that he ceases to depend upon the justice of his case and seeks discriminatory and favored treatment, he becomes a corrupter of the Government itself and is fortunate if he loses no more than the right he seeks to obtain.

* * * * * * * * *

"[Because of the illicit attempt to influence, the entire case will be stricken]. *There will be no need to consider whether or not in this case Kaufman actually succeeded in exerting an improper influence* upon Judge Davis, or whether upon the evidence before us, * * * Judges Buffington and Johnson were disqualified in this appeal." *Id.* 541

"A fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process * * *. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding * * *." *NLRB v. Phelps,* 136 F.2d 562 (5-NLRB, 1943).

"* * * One of the fundamental premises inherent in the concept of an adversary hearing, particularly if it is of the evidentiary type, is that neither adversary be permitted to engage in an ex-parte communication concerning the merits of the case * * *. It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. To allow such activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it." *Camero v. U.S.*, 375 F.2d 777 (Ct. Cl. 1967).

Another case specifically dealing with ex parte communications is *Brown v. U.S.*, 377 F. Supp. 530 (N.D. Tx. 1974). The nature of the discussions between the prosecutor and the decision maker was never developed; only that they had "discussed the case" ex parte. This evidence alone was held sufficient to overturn the case. "The impartial conduct of a *judicial* or quasi-judicial proceeding is one of the most fundamental rights of due process that we have," *Id.* 539.

In *Rapp v. Van Dusen,* 350 F.2d 806 (En banc, 3-Pa.

1965), the trial court was held disqualified to proceed further because of ex parte consultations with defense counsel for the purpose of preparing his answer to plaintiff's mandamus:

> "* * * The proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses may be struck only in the observing presence of all parties and counsel." *Id.* 812

The Court further indicated that a judge must "be guarded from engaging in ex-parte discussions with counsel or aligning himself, even temporarily with one side in pending litigation." *Id.* 813

Other cases holding that ex parte communications deny a fair trial are *Greater Boston v. FCC,* 444 F.2d 841 (C.A. D.C. 1970), *Jarrett v. U.S.,* 451 F.2d 623 (Ct. Cl. 1971) and *Public Service T.V. v. FCC,* 317 F.2d 900 (C.A. D.C. 1962).

PETITIONER HAS BEEN DEPRIVED OF A CONSTITUTIONAL RIGHT

Drawing the question as narrowly as possible: Does a litigant have a due process right *not* to be tried before a tribunal which has entertained ex parte communications calculated to influence its judicial action and has privately expressed its opinion to the other side? Or, can the cases cited be dismissed as "procedural matters only?" Any question may be answered by inspection of the authorities themselves. They all speak with reference to due process, to the fundamental nature of a fair trial where all the contentions are received at an open hearing. Any possible doubt is erased by a series of "impartial tribunal" cases

from state courts led by *Tumey v. Ohio,* supra. (Due Process denied where judge of mayor's court received payment only if conviction secured.):[10]

> "The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance, nice, clear and true between the State and the accused denies the latter due process of law." *Id.* 532

In re Murchison, 349 U.S. 133 (1955), is by far the most widely cited case concerning the Due Process right of an impartial tribunal. It relied heavily upon *Tumey,* but it went far beyond *Tumey* on its facts because, in *Murchison,* there was no financial incentive involved. Held, where a judge functions as a one man grand jury in accordance with Michigan law and where that judge charges a grand jury witness with contempt, another judge must be called to hear the contempt action:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of

[10]In that 49 year old case, the court stated its dictum that "personal bias" would seem "generally" to be a matter of "legislative discretion." The proposition is not presently applicable because there is no requirement in any of the authorities relied on herein that the injured party allege or prove "personal bias." Disregarding any such distinction, **In Re Oliver,** 333 U.S. 257, 278 (1948), held that Due Process required a charge "fairly made and fairly tried in a public tribunal." As pointed out in **Jarrott** and **Lewis,** ex parte communications defeat the right to a public trial. Because of the denial of an open hearing, petitioner was unable to answer Judge Walker's contentions that the burden of proof had shifted and that petitioner had received "every indulgence a long suffering court can give."

> actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. * * * Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice.'
>
> * * * * * * * * *
>
> "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his * * * secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings."

Note in this respect that Judge Holland adopted Judge Walker's ex parte ("secret session,") contentions concerning burden of proof.

In *Mayberry v. Pa.*, supra, a contempt case, it was held that Due Process required the disqualification of the judge. Mr. Justice Harlan concurred that "the appearance of even-handed justice * * * is at the core of Due Process." *Id.* 469. *Johnson v. Miss.*, 403 U.S. 212 (1971) is even closer in hand. Due Process disqualified the judge from re-trying the case because the judge was defendant in another action filed by petitioner — although that suit sought no personal relief; only to control his judicial action. " 'An unbiased judge' is essential to Due Process." See also *Ward v. Monroeville*, 409 U.S. 57 (1972) (Mayor may not act as traffic judge; he has an obligation to raise revenue) again holding that Due Process requires a court impartial both in appearance and in fact.

Commonwealth v. Continental, 393 U.S. 145 (1968), does not concern state courts, but it is significant because of the similarity of facts. Reversal occurred not because the arbitrator's financial dealings were disqualifying in themselves (he was no longer in the employ of the party), but because *he concealed them.* Concealment of ex parte communications plus his ruling on burden of proof confided only to the opposition is at the heart of Judge Holland's disqualification. If Judge Walker's letter had been unsolicited and if it were the only communication between the parties, Judge Holland could easily have cured his disqualification by promptly placing Judge Walker's letter in the record and inviting all counsel to comment thereon. As in *Jarrott v. Scrivener,* supra, the disqualification arises *out of the concealment. Commonwealth* relied on *Tumey* and stated with respect to disqualification that "in the case of courts this is a *constitutional* principle * * *."

The Fifth Circuit rejected each of the foregoing Supreme Court decisions and held that the Supreme Court requires the existence of "some incentive to find one way or the other." (P.A.37) However, we do not believe the cases can be read so restrictively. Only *Tumey* involved a financial incentive in the ordinary sense, *i.e.* pecuniary gain to the judge himself. *Ward* only involved the duty of the mayor to raise revenue for the city. *Commonwealth* involved financial incentive not at all unless it might be considered that the decision maker was subject to the anticipation of further retainers from his old customer if he ruled in the customer's favor.

We have carefully re-examined *Murchison, Oliver, Mayberry* and *Johnson.* We find no financial connotations whatever.

Nor is the case in bar completely without financial incentives. In Texas, retired judges receive per diem pay for assisting the incumbent judges, Tex. Civ. Stats., *Art.* 6228b, §7. Was Judge Holland, a retired judge, residing at Montague, Texas, approximately 90 miles distant, not subject to the anticipation that unless he ruled in a manner suitable to the Dallas judges, he might not be called to serve again? Compare *Commonwealth,* supra.

The proposition is almost universal that the law requires no proof of motive, and we believe, the term "incentive" is synonymous. Certainly, there may never be direct proof of motive or incentive; It must be inferred. Our belief is that Judge Holland was persuaded to act in this unseemly manner out of a feeling of kinship for a fellow judge. As far as the letter is concerned, he was bound to apprehend the embarrassment that disclosure of this confidential memorandum would bring to Judge Walker. He was thus motivated, or provided with the incentive to suppress it. If proof of motivation or incentive be required in this case, it may be inferred from the conduct shown and from the relationship of the parties as clearly as it may be inferred from any other Supreme Court authority cited herein.

For the Fifth Circuit to declare that Judge Holland had no incentive to exhibit partiality by lending a private ear to the other side, begs the question. The only real question is whether he maintained his impartiality or abandoned it. If he did so without any incentive or motivation whatever, he committed an irrational act. We are unwilling to accept the conclusion that this or any other judge acted irrationally, leading back to the only logical conclusion; to-wit — that Judge Holland had some incentive to act in the manner in which he acted, whether or not such incentive is apparent.

In re White, supra, and most of the other lower court cases cited above rely heavily on *Murchison*, the leading case upon the requirement of an impartial tribunal. That authority was also relied upon in *Sheppard v. Maxwell*, 231 F. Supp. 37, 64-66 (S.D. Oh. 1964). Habeas was granted there because the state judge commented to onlookers and to a newspaper reporter that the defendant was " 'as guilty as he (the Judge) was innocent' " and the defendant was "guilty as hell."[11] Relying on *Murchison* and *Mayberry*, habeas was granted in *Edwardsen v. Gray*, 352 F. Supp. 839 (E.D. Wis. 1972), where a state judge presided at the probation revocation hearing when that judge was at the same time the complaining witness upon a capias for wilful failure to appear.

THE CONSTITUTIONAL RIGHT DEPRIVED WAS SIGNIFICANT

Certainly, the Constitution guarantees trial before a fair and impartial tribunal. The rule is indisputable. The argument can only relate to its application. Likewise, the conduct of the trying judge, the Honorable Louis T. Holland was, beyond doubt, improper. As we read *Chapman v. Cal.*, supra, the petitioner in habeas must prove that he has been denied a significant constitutional right. At that point, we believe the case comes under the automatic reversal rule. If not, the burden falls upon the prosecution to prove the error to be harmless beyond a reasonable doubt. All of the cases cited from *Tumey* to *Ward* apply the rule of automatic reversal. The Fifth Circuit disregarded these rules and placed no burden on the State. Instead, it took the view

[11]Reversed, statements insufficiently proved, 346 F.2d 707, 725-730 (6-Oh. 1965), reversed on other grounds, trial court judgment reinstated, 384 U.S. 33 (1965).

that petitioner was burdened to show that the ex parte communications had some "effect on the trial judges determination." Petitioner urges that wherever there is a significant defect in the impartiality of the tribunal, reversal must follow regardless of the evidence against the accused.

It is granted that when impartiality is challenged upon the grounds of ex parte communications, it becomes necessary to sort out the significant from the insignificant. In this connection, the impartial jury cases are illustrative. *Turner v. La.*, 379 U.S. 466 (1965), was reversed because deputies who had testified were in charge of the jury. There was no proof of any attempt to influence whatever, but the Court reversed (over a dissent of no prejudice shown) because "the relationship was one which could not but foster the jurors' confidence * * *."[12] In *Gonzales v. Beto*, 379 U.S. 466 (1972), the Court re-affirmed Turner while indicating that no relief would be given where there were "certain chance contacts between witnesses and jury members * * * in the hall or * * * in an elevator."

A fair and impartial decision maker, judge or jury, is equally fundamental. While the test as to what is a significant contact will necessarily vary, it is presented that the underlying rule should not vary. Judges are not cloistered monastics, they are active members of society. Visiting with other judges and with attorneys is commonplace. Occasionally, judges may discuss with witnesses questions of health, availability, desires to be dismissed, etc. It would not be extraordinary for such to be ex parte. However, there is a clear dividing line. The standard was set out in

[12]The parallel between an impartial judge and an impartial jury is enhanced by the fact that **Turner** relied heavily on **Murchison.**

Root v. Universal, supra at 541, where the Court followed the A.B.A. Canons:

> "* * * Which provide that a lawyer shall not communicate or argue with the judge as to the merits of a pending case, and which denounce any device or attempt to gain from a judge special personal consideration or favor."

The sword is two-edged. If the lawyer is forbidden to make ex parte communications, the court is disqualified by entertaining them. Such was the result in the *Root* case. In *Commonwealth,* disqualification was measured by the rules of the American Arbitration Association and the Canons of Judicial Ethics. The Texas Canons in force on July 14, 1972 are even more explicit:

> "A judge should not permit private interviews, arguments, or communications *designed to influence his judicial actions,* * * *
>
> "Ordinarily all communications of counsel to the judge *intended or calculated to influence action* should be made known to opposing counsel." *Canon* 11, Jud. Sec., Tex. Bar (1964).

In April of 1972, a panel of distinguished lawyers and judges promulgated the *ABA Code of Judicial Conduct* which was adopted by the ABA convention in August of 1972. The Judicial Conference of the United States has also adopted the ABA Code. *Canon* 3A(4) provides:

> "A judge should * * * neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." *ABA Code, Judicial Conduct,* p. 11 (1972)

The canon is amplified in the *ABA Standards of Criminal Justice*:

"1.2 *Adherence to standards.* The trial judge should be familiar with and adhere to the canons and codes applicable to the judiciary, the code of professional responsibility applicable to the legal profession, and standards concerning the proper administration of criminal justice.

* * * * * * * * *

"1.5 *Duty to maintain impartiality.* The trial judge should avoid impropriety and the appearance of impropriety in all his activities, and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. * * *

"1.6 *Duty to prevent ex parte discussions of a pending case.* The trial judge *should insist* that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with him ex parte, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice." *ABA Standards, Criminal Justice: The Trial Judge*, p. 8 (1972).

"*Commentary.* Even when entirely innocent, *ex parte* discussions of pending cases have the *appearance of partiality* and therefore *should be strictly avoided.* * * * In criminal matters there is a special danger arising from the fact that the management of the calendar, the conduct of grand jury proceedings, and (depending upon local practice) the accomplishment of other necessary business tends to keep prosecutors in regular contact with judges. Even with respect to these mat-

ters, *ex parte* contacts should be kept to the minimum. insofar as possible, the judge should keep these meetings isolated from contexts which might easily be misconstrued." *Id.* p. 34

Please allow us to make our point once more because it completely escaped the Fifth Circuit in its decision below. While a judge has no duty to refrain from communications with lawyers or with other judges, *he has an affirmative duty not to discuss a case ex parte.* Even further, *he has a duty not to allow "communications designed to influence his judicial actions."* This is the dividing line, a clear watershed. Just as clearly, the Honorable Louis T. Holland stepped over that line. *Petitioner's proof shows that he privately consorted with the other side.* Petitioner's proof shows that the consortation was not merely social; *the private consortation regarded this very case and was calculated to influence his judicial action.* This satisfies the *Gonzalez* requirement that the contact be significant. Petitioner's proof is complete. *Automatic disqualification applies.* Alternatively, the burden shifts to the prosecution to prove "harmless beyond a reasonable doubt."

We think that Judge Holland or any other judge knows what to do when he receives a letter calculated to influence judicial action. *Spread it on the record!! Invite comment from all parties!! Anything less amounts to a clear and definite compromise of the neutral stance of an impartial tribunal.* It constitutes a disqualification.

In connection with the case of *In re White*, supra, we have inspected the case of *In re Emmett*, 300 So.2d 435 (Ala. Sup. 1974). It reflects that when the trial judge's confidential letter reached the Court of Criminal Appeals, that court forwarded the letter to the state judicial commission

for evaluation as to judicial misconduct or impropriety. We present that had the appellate court done any less, it would have tainted and disqualified itself. Verily, it is as bad to receive (and conceal) as it is to send, *Root v. Universal*, supra.

Mause, *Harmless Constitutional Error*, 53 Minn. L. Rev. 519 (1969), closely analyzes *Chapman* and suggests that automatic reversal is based upon a policy to discourage official misconduct and to maintain public respect for the judicial system. Appropriately, Mr. Justice Stewart argued in *Chapman* that "automatic reversal" would be best calculated to prevent "clear violations of * * *" (the rule against commenting on the defendant's silence). Concerning back-door communications with the court, the cases add another element — there is no reliable means to determine exactly what transpired; an element emphasized in *Turner*. It is difficult if not impossible to determine the true harm. What can be determined is that this type of conduct has no place in our judicial system. The most effective means of discouraging it, if not preventing it altogether, is to reverse whenever it is encountered.

Tumey, Murchison and *Ward* are the leading cases on judicial disqualification. They all emphasize that every procedure which would offer a possible temptation to forget the burden of proof denies Due Process of Law and disqualifies. Justice must satisfy the appearance of justice.

THE TRIAL WAS ESSENTIALLY UNFAIR

Petitioner presents to the Court alternatively, but not much differently, that regardless of whether or not the Honorable Louis T. Holland was disqualified, he failed to afford petitioner an essentially fair trial. The fact statement

under this issue is the same plus more. The trying judge had a conference with the complaining judge and the special prosecutor. A letter was written to the trying judge which the author testified was sent at the judge's request. Apparently the trying judge essentially agreed with the contention made because he testified in his deposition to the U.S. District Court as follows:

> "Q. Do you have any recollection of the discussions between yourself and Judge Walker * * *.
>
> "A. I remember we discussed the law, the new contempt proceedings, new contempt law, and what it meant and what application — how it ought to be applied and determine if you have to have a statement of facts and the findings, what he found and then his order of contempt, and then whether or not the law intended for another judge to review the proceedings and determine whether or not such judge had abused his discretion in exercising the law as he had, or words to that effect, I don't remember. And the new law we were just kicking it around and discussing it.
>
> "Q. This was in Judge Walker's office? "A. Probably was, yeah.
>
> "Q. And Mr. Coleman [the special prosecutor] was present? "A. I'm sure he was part of the time. I don't remember now."
>
> * * * * * * * * *
>
> "A. I think so, I think that was his [Judge Walker's] opinion, mine was the contrary. I told him I thought he needed to make his own findings and set his own contempt fine and *then it would be up to the new judge*

to review that and tell him whether or not it was an abuse or whether it was justified.

* * * * * * * * *

"A. We were trying to interpret the new contempt law. It was my opinion that it meant one thing and he was of the opinion that it meant another thing. I thought if the judge affirmed the — the court where the contempt was committed ought to set the punishment.

"Q. The offended judge? "A. The offended judge. And we were discussing that. *Then the other judge was called in to review, I thought then he had a job to review.* And that's what we were talking about and that's what he's talking about there [in Ex. 1 to Holland Dep., J.A. 282]

"Q. Was it further your expression to Judge Walker that he as the offended judge should prepare findings of the facts for you to review, is that right? "A. Findings are [sic] facts upon which the base is [sic] holding you in contempt." (Quare: Findings of fact upon which to base his holding you in contempt.) (J.A. 278-280).

PETITIONER HAS BEEN DEPRIVED OF A "PUBLIC TRIAL": BEING GUARANTEED BY THE 6TH AND 14TH AMENDMENTS

Petitioner relies on *In re Oliver*, supra. The matter cannot be dismissed as mere irregularity. "It is difficult if not impossible for a judge to free himself from the influence of what took place in his * * * secret session." *In re Murchison*, supra at 138.

See also *Rogers v. U.S.*, 422 U.S. 35 (1975) reversing for the judge's failure to disclose that he had communicated with the jury. The Court emphasized the violation of the

statute requiring proceedings in open court but the statute in turn is clearly based on the Sixth Amendment. Other cases on the denial of a public trial are *Bustamente v. Eyman,* 456 F.2d 269 (9-Ca. 1973), *Hensley v. Municipal Court,* 365 F. Supp. 373 (N.D. Ca. 1973) and *Caudill v. Peyton,* 368 F.2d 563 (4-Va. 1966).[13]

Petitioner Was Not Notified That The Burden of Proof Was Being Thrust Upon Him

We submit, infra, that the Texas Criminal Contempt Statute as construed by the Court of Criminal Appeals, calling for the determination of guilt and the assessment of punishment before, rather than after the trial is unconstitutional, but the present argument applies even if it be upheld. Petitioner received no notice of Judge Holland's interpretation of the statute. He tried the case unaware of the burden he must meet. "The burdens thus placed upon the petitioner were real, not purely theoretical. For, 'it is plain that where the burden of proof lies may be the outcome.' " *Armstrong v. Manzo,* 380 U.S. 545 (1965). See *Trimble v. Stynchecombe,* 481 F.2d 1175 (5-Ga. 1973), granting habeas where the state court mislaid the burden of proof.

The essential unfairness of the proceedings was compounded when Judge Holland, consciously or unconsciously, misled petitioner as to the prima facie effect of the "Declaration and Certificate" by referring to it as a "complaint" (J.A. 39). He further gave the illusion that the burden of

[13]**U.S. v. Grinnell,** supra, the only authority relied on by the Fifth Circuit, is usually cited for the proposition that bias, to be disqualifying, must arise from an extra-judicial source. Did the Court consider that Judge Holland was acting judicially at that meeting, in requesting and receiving that letter, and in giving his opinion to one side only? If so, petitioner's Sixth Amendment right of public trial has assuredly been violated.

proof was upon the prosecution by overruling the motion to quash where petitioner urged that the "Declaration and Certificate" was a judgment instead of a complaint (J.A. 33, 38-39). This failure to disclose and the handling of the motion to quash created a false impression or a false state of affairs making *U.S. v. Rispo*, 460 F.2d 965 (3-Pa. 1972) (trial of informer as co-defendant allowed a false state of affairs to exist at the trial) in point:

> "The basic concept of due process is fair play. * * * Fair trials insure our concern with due process * * *. It is only in this way that we prevent the undermining and mockery of justice. 'The most fundamental of a reviewing court's duty is to see to it both that the end result is just and correct and that the means utilized are fair and proper.' "

See *U.S. v. Smith*, 480 F.2d 664 (5-Fla. 1973), holding the failure to disclose a promise to recommend probation to a co-operating witness violated due process. Nor is it necessary to prove intentional failure to notify defendant of the burden he must meet. In *Giglio v. U.S.*, 405 U.S. 150 (1972), the failure to disclose that a witness had been promised leniency was held to require reversal even though the prosecutor conducting the trial did not know that his associate had made such promise. Distinctions between negligent and wilful non-disclosure rejected; standard of affirmative duty to disclose substituted.

Petitioner Was Deprived of The Right To Contend That Judge Walker Had Changed His Position

While he previously had assured petitioner that "a different judge" would pass upon "the whole thing," Judge Walker privately urged Judge Holland that his "Declara-

tion and Certificate" was "the primary fact finding" and that "nominal testimony" would suffice. This change of position would have been proper cross-examination for the purpose of showing bias and prejudice and as an attack upon credibility. We presume that Judge Holland did not know of Judge Walker's change in position, but the suppression of the letter nevertheless denied petitioner of this valuable line of cross-examination. The right of cross-examination, which has been described as the essence of the Sixth Amendment right of confrontation was materially impaired by this non-disclosure. What did Judge Walker mean by his self-serving declarations — "every right, every consideration, and every indulgence" — "spirit in vain" — "Court's own motion"? Petitioner was not able to inquire because the making of those representations was withheld from him.

U.S. v. Harris, 462 F.2d 1033 (10-Kan. 1972), states that the suppression of "evidence favorable to the defense and affecting the credibility of a key prosecution witness may result in such inherent unfairness as to be violative of due process inadvertent or not." See also *Napue v. Ill.*, 360 U.S. 264 (1959), stating that the rule against the use of false testimony does not cease to apply merely because the falseness goes only to credibility.

As we read *Giglio*, non-disclosure falls under the automatic reversal rule. Of course, the Court stated that it would not automatically require re-trial because there was a scrap of undisclosed evidence in the prosecutor's file, but new trial is required if the evidence " 'could . . . *in any reasonable likelihood* have affected the judgment of the jury.' " Parallel to the case at hand it was held that where the case depended almost entirely upon the testimony of a single witness (Judge Walker presently), the non-disclosure of

evidence "relevant to his credibility" violates due process. We think the ruling controls the case in bar.

Judge Walker advised Judge Holland that he had been "extremely careful" to provide petitioner with "every right" that "a long suffering court can give"; that petitioner had received "every privilege that we can envision." Petitioner can envision several privileges that were never extended: the "privilege" to have a "public trial" with all proceedings in open court; the "privilege" to know of the meeting between the trying judge, the complaining witness and the special prosecutor; the "privilege" to participate in person or by counsel in discussions regarding the construction of the statute; the "privilege" to answer the argument that the "Declaration and Certificate" constituted a prima facie judgment; the "privilege" to contend that the Constitution prohibits shifting the burden of proof in a criminal proceedings; the "privilege" to argue for the presumption of innocence and proof beyond a reasonable doubt. Petitioner was further denied the "privilege" to point out that Judge Walker had drastically changed his position since March 3rd when he assured that "no formal ruling had been made," and that another judge would pass "on the whole thing." Petitioner was also denied the privilege to urge that the last paragraph of the letter concerning "right" and "privilege" was a pitch for sympathy, an attempt to pre-dispose the trier of fact in favor of the complainant's version of the case. The denial of these and other "privileges" resulted in an essentially unfair trial and a deprivation of due process.

JUDGE WALKER'S PARTICIPATION DEPRIVED PETITIONER OF AN IMPARTIAL TRIBUNAL

Petitioner further presents as an alternative that the Honorable Dee Brown Walker participated in the adjudica-

tion, that he was disqualified to do so, and that petitioner was thereby deprived of an impartial tribunal "in the first instance," *Ward v. Monroeville,* supra.

The initial adjudication against petitioner occurred on March 3, 1972 when Judge Walker, almost spontaneously, announced from the bench, "I hold Mr. Howell in contempt of the Court for misleading me last summer * * *" (J.A. 19). The adjudication was entered into the record by the "Declaration and Certificate," signed officially by Judge Walker, stating that he had "found and declared on March 3, 1972" petitioner to be "guilty of contempt" (P.A.4). Judge Walker urged to Judge Holland that his certificate was "the primary fact finding" and Judge Holland privately stated his view that he was "called in to review" whether or not it was "an abuse" (of discretion). The Court of Criminal Appeals interpreted the new Texas Criminal Contempt Statute as providing that the trying judge is only called for the limited purpose of determining if the defendant is "actually guilty" and for "readjudication," after the complaining judge had "fulfilled all his requirements for holding [not "citing" or "charging" or "accusing"] 'an officer of the court' guilty of contempt," (P.A. 20-21). The Court found "Judge Walker * * * assessed petitioner's punishment at three days (72 hours) in jail and a fine of $100" (P.A.19-20). Can it be doubted; the Honorable Dee Brown Walker participated in the adjudication.

(1) Judge Walker was disqualified because of a personal dispute with petitioner. As presented in "Statement of the Case," the contempt proceedings came on the heels of a "motion to delete" contending that Judge Walker had caused the alteration of court papers. Manifestly, after this dispute arose, Judge Walker became disqualified to hear contempt charges or pronounce judgment. *Johnson v.*

Miss., supra, is "white horse" authority. That judge was defendant in a civil rights action and contemner was plaintiff. Allegations there were systematic exclusion of minorities from juries; allegations here are the alteration of court records. In both instances, the accused had charged the judge with official misconduct. "It is plain that he was so enmeshed in the matters involving petitioner as to make it most appropriate for another judge to sit."

(2) Judge Walker is the Complainant: A man may not be tried by his accusers. The leading case is *In re Murchison*, supra, stating: "Our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case" and further observing:

> "Having been a part of * * * [the accusatory process] a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

As pointed out by the Court of Criminal Appeals *Murchison* states: "Contempt committed in a trial courtroom can *under some circumstances* be summarily punished," but we submit "no man may try his own case" as the fundamental rule and summary punishment as the exception. *Unless summary was permissible, it was not permissible for Judge Walker, "the accuser," to adjudicate.*

(3) Summary punishment was never permissible: All elements of the offense not being " 'under the eye or within the view of the court.' " Prior to the filing of Judge Walker's "Declaration and Certificate" there had been no

contempt trial or hearing, either on March 3, 1972 or any other date. As pointed out, this document was not merely an accusatory pleading, it was some type of judgment. It was summary by definition; there had been no hearing. There may be no summary convictions for contempt unless all elements of the offense occurred " 'under the eye or within the view of the Court,' " *Codispoti v. Pa.*, 418 U.S. 506 (1974) (Dissent). The proposition runs back to *Cooke v. U.S.*, 267 U.S. 517 (1925), where summary conviction was reversed because the judge, without taking evidence, could not know the author of the offensive letter and the circumstances under which it was written. Held, defendant's own admissions do not convert a case constitutionally subject only to non-summary procedures into a case which, under the Constitution, might be summarily punished. Accord, *U.S. v. Marshall*, 451 F.2d 372 (9-Wash. 1971).

The gist of Judge Walker's complaint is that he did not know there was another case pending and did not know that counsel "had appeared before Judge Gibbs in both cases just two days before" (P.A.19).[14] The "Declaration and Certificate" states he subsequently "learned from the parties and the records" (petitioner was an attorney, not party) the facts allegedly withheld on May 26th (P.A.3).[15]

[14]Petitioner contends that Judge Walker did, in fact, know of the other case pending when he decided to proceed. At the default hearing, petitioner handed to him the docket sheet containing Judge Gibbs' handwritten notations and signature. (J.A. 57-58, 114-115). Mr. Howell disclosed that the parties had been "down here on temporary matters" (P.A.12), but Judge Walker exhibited no interest in the temporary matters. Instead, he endorsed the default on the docket sheet immediately below Judge Gibbs' signature.

[15]Petitioner argued to the state court that an attorney is an advocate and not a surrogate, that the matters in question constitute the defense of **autre action pendant**, a defensive plea, and that a lawyer has no duty to present his opponent's case (R. 896-98, J.A. 181-83, R. 1450-62). The argument was unanswered.

Evidence had to be presented of that which was not disclosed.[16]

Johnson v. Miss., supra, holds that unless the judge personally witnessed the misconduct, summary will not lie. *Groppi v. Leslie,* 404 U.S. 496 (1972) (fn. 8), states the Court has limited summary to instances where the conduct was personally observed by the Judge. Because of the eye witness restriction, this case of "failed to make full disclosure" was never constitutionally subject to summary action. In short, the case by its nature was never subject to summary procedures. For such reason, it was improper for Judge Walker to participate in the adjudication. He was the "prosecuting judge" and was disqualified to pass judgment upon the charges he had preferred unless summary proceedings were proper. *In re Murchison,* supra. Inasmuch as summary procedures were not proper in this case, Judge Walker was disqualified to participate in the adjudication.

(4) Summary punishment was not permissible: There was no urgency. The default is dated May 26, 1971. At a hearing on July 23, 1971, the matter was aired and Judge Walker attempted to persuade petitioner to set aside the default by agreement (J.A. 61-62). It was March 3, 1972 before Judge Walker held petitioner "to be guilty of contempt" while assuring petitioner that "any ruling" would be "deferred." The "Declaration and Certificate" was filed June 28 and hearing set for July 28, over a year after this "failed to make full disclosure" first came to his attention.

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[16]Similarly, due process forbids summary punishment for false testimony. "Knowledge acquired from the testimony of others, or even from the confession of the accused would not justify conviction without a trial," **In re Oliver,** supra at 275; **Matusow v. U.S.,** 229 F.2d 335 (5-Tex. 1956); **Ciraolo v. Madigan,** 443 F.2d 314 (9-Cal. 1971).

We deny that due process allows summary proceedings when the charges are as stale as this. In the last few years, the Supreme Court has entered five successive reversals indicating in each case that where the complaining judge waits until the end of a trial to impose contempt penalties, he usually must call another judge. (1) *Mayberry;* (2) *Johnson*; (3) *Re: Little*, 404 U.S. 553 (1972); (4) *Codispoti v. Pa.* and (5) *Taylor v. Hayes*, 418 U.S. 488 (1974). See also *In re Dellinger*, 461 F.2d 389 (7-Ill. 1972) and *U.S. v. Meyer*, 462 F.2d 827 (C.A. D.C. 1972). In *Codispoti*, it was observed that when the complaining judge waits until after the trial, "there is no overriding necessity for instant action to preserve order and *no justification for dispensing with the ordinary rudiments of due process.*" In *Taylor*, the Court stated it was not concerned with the power "for the purpose of maintaining order in the courtroom to punish summarily. * * * The usual justification of necessity * * * is not nearly so cogent when final adjudication and sentence are postponed * * *. 'Summary punishment always, and rightly, is regarded with disfavor.' " Inquiry runs not to "actual bias" but to the question whether there was " 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interest of the accused.' " (Relying in part on *Murchison*).

Admittedly, in some instances, the summary power may persist beyond the trial, but we cannot conceive where after a one year time lapse, the orderly dispatch of business would outweigh the due process considerations favoring an impartial tribunal. Again, this case was not on March 3, 1972 appropriate for summary conviction; Judge Walker, the "accuser," was disqualified to proceed.

(5) The slate must be wiped clean. In *U.S. v. Seale*,

461 F.2d 345 (7-Ill. 1972), the complaining judge prepared a "Certificate of Contempt," somewhat similar to within "Declaration and Certificate." The Court of Appeals held:

> "At the remand, the specifications we have upheld as a matter of law should be treated as charges against Seale and have no other effect.
>
> * * * * * * * * *
>
> " 'The presumption of innocence, as in other criminal cases, attaches and all elements of the offense must be proved beyond a reasonable doubt,' " *Id.* 371-372.

It is clear that the present "Declaration and Certificate" was not so treated. Even assuming the unorthodox procedure here followed with approval of the Court of Criminal Appeals complies with due process minimums, petitioner has still been deprived of an impartial tribunal because he was convicted in "the first instance" by the Honorable Dee Brown Walker. *Ward v. Monroeville*, supra. Only by granting a new trial, by wiping the slate clean, *Armstrong v. Manzo*, supra, and by treating the "Declaration and Certificate" as a statement of charges that the prosecution is burdened to prove could Judge Holland have cured this situation or may the situation now be cured. See also discussion of *Deutch v. U.S.* and other cases, discussed infra, in connection with our attack on the validity of the statute.

THE HONORABLE LOUIS T. HOLLAND DISPLAYED EVIDENT PARTIALITY

As another alternative but related grounds, petitioner submits that the overall picture is one of evident partiality.

The sole reason advanced by the cases for calling another judge is to secure a decision maker divorced from

partisanship who will treat both sides equally; who will conduct the trial with utmost fairness.

In the present case, as soon as he was appointed, the trying judge called upon the complaining witness. He allowed the complaining witness to nominate a special prosecutor, not advising the accused that the complainant had received this consideration. He participated in a private conference with the complainant and the special prosecutor; the three discussing the method of proceeding. He apparently invited the complainant to submit an ex parte memorandum concerning the case. He did not notify the accused that he had received this memorandum. He did not invite the accused to submit his view of the matter, did not cause the memo to be placed in the official court files. He privately stated his opinion that the law only required him as trying judge to decide if the findings of the complainant were "an abuse." By such conduct he infringed upon the right to a public trial. He failed to notify the accused of the burden he was expected to meet. The letter he suppressed contained evidence favorable to the defense. He referred to the "Declaration and Certificate" as a complaint when he had, in effect, privately ruled it to be a judgment, prima facie. He overruled the motion to quash, alleging that document to be a judgment, without disclosing his ex parte ruling. He required petitioner to proceed without counsel, even without associate counsel. When petitioner attempted to cross-examine the complaining witness on matters potentially embarrassing, he forbade inquiry. The witness denied the alteration of records, but he refused to allow any attack on credibility. On the other hand, petitioner's failure to answer a matter that was peripheral at the most, resulted in a jail sentence. He convicted petitioner of this latter charge without appointing counsel and without first

considering less severe sanctions. He continued the trial and forced petitioner to represent himself while a prisoner with limited access to the telephone, hampered to contact witnesses, examine his own papers or go to the library (J.A. 51-52). He refused to allow petitioner to dictate a motion for directed verdict as provided by state law (J.A. 79, 101, 103, 151, 165).

Petitioner submits that the Honorable Louis T. Holland displayed the same kind of partiality in the conduct of the trial that prompted reversal in *U.S. v. Dellinger*, 472 F.2d 340, 387-389 (7-Ill. 1972). In addition to the foregoing, petitioner was also prohibited from cross-examining the witness Sessions, as to bias and prejudice (R. 809-18); the prosecution was permitted to "trash-up" the record at will (J.A. 48-50, R. 1163-1291),[17] and while the Court exhibited no hurry when the prosecution's case was being presented, it suddenly declared an intention to stay "until we finish" (J.A. 78-79) and later announced the case "is not going on all night * * * I have other plans for part of the night" (J.A. 101).

Is this not the same mounting display of unfavorable attitude found to require reversal in *Taylor v. Hayes*, supra, where the trial judge commented " 'If you give him an inch, he'll take a mile' " and that before the case is over, the petitioner "might have a lot more than five months 'wrapped up' in it"?

While Judge Holland did not declare the petitioner could not respond "on anything" and did not threaten to

[17]Large binders of court papers were placed in evidence over objection by marking an exhibit number on the file jacket. The Court could have had no notion as to what it was passing on. This was a blindfold ruling. His Honor could not know **what** he was ruling **on**; all he could know is **who** he was ruling [illegible]

gag this petitioner, the two minute proceedings in which he convicted petitioner for refusal to disclose the names of attorneys consulted, shows that he completely disregarded petitioner's objections and never answered them. He never indicated why he was compelling petitioner to testify. Instead he indicated that he was imposing punishment for petitioner's "attitude" and declared that petitioner was giving "this court no alternative." (J.A. 41-43, P.A.32). The punishment was not for failure to give relevant (reasonably needed) information, it was for insubordination. The distinction between the conduct of the Judge in *Hayes* and the conduct of the Honorable Louis T. Holland is thin indeed.

We think the basis upon which the Court there distinguished its previous authority of *Ungar v. Sarafite*, 376 U.S. 575 (1964) to be most significant:

> "We were impressed there with the fact that the Judge 'did not purport to proceed summarily during or after the conclusion of the trial, but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding.' "

As we read *Taylor*, the summary means chosen by Judge Holland to try, convict and sentence this petitioner can and should be considered in determining whether the record reflects evident partiality.

There is yet another factor upon which the Supreme Court laid emphasis: "He also refused to grant him bail pending appeal." Here, Judge Holland refused to grant bail not once but twice. In the *White* case, the Alabama court placed considerable emphasis upon the oppressive bail bonding procedures employed by the respondent judge

in the case of another defendant. Judge Holland exercised the same type of repressive practices against this petitioner.

When the noon recess arrived following this petitioner's conviction of contempt for failing to disclose the names of the attorneys consulted by him, the record reflects the following proceedings:

> "MR. HOWELL: If Your Honor please, with regard to the court contempt ruling of this morning, I would at this time ask leave to make a motion to be placed on my recognizance and have the matter heard before another Judge.
>
> "THE COURT: I held you as a witness, you are a witness in this case; in other words, not as an officer of the court, you were testifying, and I held you as a witness, and you are not entitled to hearing before anybody.
>
> "MR. HOWELL: If the Court please, could I have, be placed, allowed to be placed at large for sufficient time to file a writ of habeas corpus?
>
> "THE COURT: I'll let you go to lunch, and when we come back here, after this day is done, as far as I'm concerned, you are going to go to jail.
>
> "MR. HOWELL: At the close of the proceedings this afternoon?
>
> "THE COURT: Yes, sir.
>
> "MR. HOWELL: All right, thank you." (R. 845-846).

However, Judge Holland almost immediately changed his mind and declared that petitioner was "not being released until you are told you can be," and that petitioner could go no further than the restroom. A contempt judgment was immediately typed up and petitioner was

immediately placed in jail and brought to court in custody of the Sheriff afterward. He was forced to continue his defense while a prisoner with limited access to the telephone, to the library and to obtain witnesses (J.A. 51-52, R. 845-48, J.A. 163). Judge Holland overruled a continuance on grounds that petitioner, while in custody could not adequately represent himself (J.A. 51-52). As soon as trial of the original contempt action was concluded, he again acted peremptorily:

> "MR. HOWELL: If the Court please, could I have a stay of execution in order to apply for a Writ of Habeas Corpus?
>
> "THE COURT: You can't have any stay no more than is available to you under the law. I am not going to give you anything. You can prepare your commitment or whatever.
>
> "MR. TOLLE: Sure will, Judge, you want it right now?
>
> "THE COURT: Well, Yes." (J.A. 103).

Compare the actions of another Texas judge in the case of *Maness v. Meyers*, 419 U.S. 499 (1975). There, the offending lawyers were placed on "personal recognizance bond" while they successively petitioned the Texas Court of Criminal Appeals, the Texas Supreme Court, the U.S. District Court and the Supreme Court of the United States for relief. Denial by Judge Holland of any type of bail or recognizance pending appellate review, a matter of right under Texas law in all other misdemeanors (see discussion of constitutional invalidity of the statute, infra, *Art.* 44.04, Tex. Code of Crim. Proc.) is further evidence of a mounting display of unfavorable attitude toward the petitioner by the Honorable Louis T. Holland, Tex. Civ. Stats., Art. 1911.

There is another serious question going beyond *Dellinger, Taylor* and the cases cited below. At the time of the alleged contempt upon Judge Walker, Texas provided a maximum penalty of three days plus $100. The overall fines and penalties levied by Judge Holland totalled $600 plus 33 days "and then until you answer the question.". Viewing the record in the overall and considering the demonstrated willingness of the Honorable Louis T. Holland to lend an ear to the opposing side, does the case not raise some question as to whether or not the contempt conviction for failure to disclose the names of attorneys consulted, a matter of secondary interest at the most; was not, in fact, a vehicle seized upon by his Honor to pile upon petitioner's head greater penalties for the offense against Judge Walker than the Texas law in force at the time of that offense would allow? There is, of course, no way of confirming or denying any suspicions which might arise in this respect. However, it is unnecessary to speculate. Due process requires that a judge not only be impartial in fact, but that the integrity and dignity of the judicial process be protected from any hint or appearance of bias. The fact that the question arises emphasizes the essential unfairness of the entire proceedings.

Some of these matters are obviously more serious than others, but in the aggregate, can they be dismissed as trifles all? Or, do they rise to that level of evident partiality which prevents a fair trial before an impartial decision maker, impartial in appearance as well as in fact, the hallmark of Due Process of Law. *U.S. v. Womack,* 454 F.2d 1337 (5-Tex. 1972); *Knapp v. Kinsey,* 232 F.2d 458 (6-Mich. 1956); *Crowe v. Dimanno,* 225 F.2d 652 (1-Mass. 1955); *Whittaker*

v. McLean, 118 F.8d 596 (C.A. D.C. 1941); *U.S. v. Foster*, 500 F.2d 1244 (9-Ca. 1974).[18]

QUESTIONS TWO AND THREE:

THERE HAS BEEN NO PLENARY FEDERAL JUDICIAL REVIEW OF THE STATUTORY CLAIM.

Petitioner has included at the outset of this petition a summary of argument upon the questions at hand which is, perhaps, overlong. In the ensuing discussion, he will avoid repetition and suggests a review thereof at this point.

A new Texas Criminal Contempt Statute was enacted by the Legislature effective August 30, 1971 and the case of *Ex parte Howell*, decided on November 15, 1972, was the first opportunity which the appellate courts of Texas had to examine it. Nevertheless, the ruling by the Texas Court of Criminal Appeals upon the constitutional issues raised by petitioner was cursory, almost out of hand (P.A.17-23).

Examination of the record reflects that petitioner attacked the statute upon nine separately numbered and separately stated grounds (A.187-189). This petitioner asked the Texas Court of Criminal Appeals for a rehearing

[18]The Fifth Circuit was of the opinion that there may be no relief with respect to ex parte communications unless the complaining party shows that they had some "effect on the trial judge's determination." (P.A.36-37). How, we ask hypothetically, can this "effect" be shown? Being unable to probe Judge Holland's mind, we must look for "effect" in his rulings and his demeanor. Petitioner urges that his conduct in entertaining the private ministrations of the opposition indicates a bent of mind favorable to the prosecution. It is submitted that his rulings and his demeanor as outlined in this subtopic confirm that bent of mind. Petitioner has shown as much in the way of "effect" as can possibly be produced. As held in **White** the "hard evidence" of ex parte communications is confirmed by the attitude and demeanor of the Honorable Louis T. Holland creating proof of the disqualification.

in which he amplified his federal claims against the statute, cited a number of additional authorities, and urged that the construction then being placed upon the statute raised further constitutional issues (A.211-213). Petitioner argued that the statute was being construed to deprive the presumption of innocence, to shift the burden of proof, that the construction of the statute rendered it unconstitutionally vague and violated the overbreadth doctrine. Rehearing was denied without opinion (P.A.24).

Clearly, the case fell within 28 *U.S.C.*, § 1257(2) providing that state court judgments may be reviewed "*by appeal*, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity" (P.A.43).

Petitioner was thereby cast upon the horns of a dilemma. On the one hand, he was faced with several authorities from the Supreme Court itself, holding that the failure to exhaust an available appeal works a forfeiture of the right to employ the collateral remedy of habeas corpus. On the other hand, he found a raft of authorities questioning the strength of summary rulings upon jurisdictional statements filed in the Supreme Court. He could find no Supreme Court decision of recent vintage answering any of the following questions:

(1) If the right of appeal to the Supreme Court is available and a state criminal defendant elects not to appeal, is he barred from filing federal habeas on the grounds of failure to exhaust?

(2) Or, if a state criminal defendant files a jurisdictional statement with the Supreme Court and if the appeal is summarily denied, is the defendant precluded from

federal habeas review of the federal claims presented in the jurisdictional statement?

(3) Even further, is it possible that the cases providing that state statutes may only be reviewed by the Supreme Court on a direct appeal are still viable?

HISTORICALLY, EXHAUSTION REQUIRED AN APPLICATION FOR SUPREME COURT REVIEW BEFORE SEEKING FEDERAL HABEAS

The earliest and most stringent barrier to federal habeas review was the exhaustion rule. *Ex parte Royall*, 117 U.S. 241 (1886). While it was uniformly agreed that the federal courts were possessed with ample power to inquire into the detention of a state prisoner at any time and at any stage of the proceedings, the exhaustion rule was early extended to require not only that the petitioner exhaust in the state's highest court, but that he proceed from there to the U.S. Supreme Court before seeking a federal writ:

> "If the applicant thought that the decision * * * in the Supreme Court of the State was in violation of his rights under the Constitution or laws of the United States, he could have brought the case by writ of error directly from that court to this court." *Urquhart v. Brown*, 205 U.S. 179 (1907).

In 1925, review in the Supreme Court by certiorari was substituted for review by writ of error, but the exhaustion rule continued to require an application for review in the U.S. Supreme Court as a pre-requisite to federal habeas. In *Ex parte Hawk*, 321 U.S. 114 (1944), the Court stated:

> Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after

> all state remedies available, including all appellate remedies in the state courts *and in this Court by appeal* or writ of certiorari have been exhausted."

The court summarized the holdings of prior cases to the effect that federal writs are only available to state prisoners " 'in rare cases' presenting 'exceptional circumstances of peculiar urgency.' "

Ex parte Hawk was in keeping with the reluctance prevailing since the Civil War to give writs to state prisoners. The case is significant to this petition because it was the first case after certiorari was substituted for writ of error to specifically declare that the right to review "in this Court by appeal" must be exhausted. In keeping with the same reluctance, *Hawk* further declared the following to be the established rule:

> "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus, the questions thus adjudicated."

Under "summary of judgment," petitioner asked if state rulings upon the constitutionality of their own statutes may be reviewed except in the Supreme Court. If *Hawk* still be the law, then the answer clearly is "Yes." Any attack upon the constitutional validity of a state statute must be commenced in the state court. This, beyond doubt, is still the law. If the claim be rejected, even without opinion, or without expressly passing upon the point tendered, it matters not whether the ruling be explicit or implicit, an appeal lies to the Supreme Court and the exhaustion rule as laid down in *Hawk* holds that it must be exercised.

Furthermore, if the Supreme Court denies review, a federal district court will not ordinarily re-examine. Thus, under *Hawk*, appeal was not merely a prerequisite to habeas, it was the exclusive method to question the validity of state statutes.

Ex parte Hawk established a bench mark. The disaffinity of federal courts for the consideration of writ applications from state prisoners had already begun to dissolve. See *Moore v. Dempsey*, 261 U.S. 86 (1923) and *Mooney v. Molohan*, 294 U.S. 103 (1935).

In the case of *Darr v. Burford*, 339 U.S. 200 (1950), the Supreme Court was asked to reconsider the rules laid down in *Ex parte Hawk*. That petitioner exhausted in the state courts, but made no application for certiorari to the Supreme Court. While the Court retreated from the extreme position of earlier years, it still held that habeas would not lie. The *Hawk* decision was quoted with approval to the effect that exhaustion included application for Supreme Court review "by appeal or writ of certiorari."

> "Ex parte Hawk has made it clear that all appellate remedies available in the state courts and in this Court must be considered as steps in the exhaustion of the state remedy * * *."
>
> * * * * * * * * *
>
> "As the *Hawk* requirement, we think, has always been the rule, no change in procedure is necessary * * * no person restrained by state process could heretofore have been certain of a hearing on the merits of his application to a federal district court unless he had sought review in this Court of the state's refusal to release him." *Id.* 217.

"Oklahoma denied habeas corpus after obviously careful consideration. If that denial violated federal constitutional rights, the remedy was here, not in the District Court and the District Court properly refused to examine the merits." *Id.* 219.

While *Darr* reaffirmed the *Hawk* rule insofar as it held Supreme Court review to be a prerequisite to federal habeas, it indicated a retreat from the proposition that the denial of certiorari would not "ordinarily" be re-examined upon habeas. *Darr* was entirely silent as to whether the summary disposition of an appeal might have a like effect. The metamorphosis was continued in *Brown v. Allen*, 344 U.S. 433 (1953) where it was expressly held that habeas would lie after certiorari had been denied and where the Court further held that the prior denial of certiorari "should be disregarded in passing upon a subsequent application for relief," *Id.* 488. However, the Court restricted its discussion only to certiorari. It was again completely silent as to the effect of a prior attempted appeal. *Hawk* and *Darr* remained the most recent statements concerning appeals.

Fay v. Noia (1963) was undoubtedly a landmark in federal habeas law. The ancient roots of the Great Writ were explored. The constitutional dimensions of the writ[19] was a recurring theme of the decision.[20] Its position as the

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[19]U.S. Constitution, **Article 1, §9, cl. 2:** "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

[20]"We need not pause to consider whether it was the Framers' understanding that congressional refusal to permit the federal courts to accord the writ its full common law scope as we have described it might constitute an unconstitutional suspension of the privileges of the writ. There have been some intimations of support for such a proposition in decisions of this Court * * * (T)he Constitution invites, if it does not compel * * * a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice." **Id.** 400-406.

bulwark of personal liberty and the greatest safeguard against unjust confinement was heavily emphasized. It was held that, beyond question, there is no res judicata in habeas corpus. When a federal claim is presented, the federal court may not defer to the state court upon questions of law and may not even defer to state findings of fact unless the federal court affirmatively determines as a predicate that the state findings of fact are based upon a full and fair hearing.

> "* * * Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review," *Id.* 424.

Fay v. Noia expressly discussed both *Hawk* and *Darr* and concluded:

> "* * * What we hold today necessarily overrules *Darr v. Burford* to the extent that it may be thought to have barred a state prisoner from federal habeas relief if he had failed timely to seek certiorari in this Court * * *. Because the hurdle erected by *Darr v. Burford* is unjustifiable under the principles we have expressed, that decision in that respect also is hereby overruled."

However, even though both *Darr* and *Hawk* spoke in terms of "*by appeal* for certiorari," *Fay* was again silent as to the requirement upon a litigant when an appeal to the Supreme Court is available. Also, the reasoning of *Fay* indicates that the *Darr* requirement for certiorari was being overruled on the grounds that review by writ of error had been supplanted by certiorari, " 'not a matter of right, but of sound judicial discretion,' " *Id.* 436.

The Supreme Court has not spoken to further clarify the matter. We find little further in point.

In *Jellum v. Cupp*, 475 F.2d 829 (9-Or. 1973), the state's highest court had rejected the petitioner's claim that the statute was constitutionally invalid. The state's attorney subsequently contended in the Ninth Circuit that the petitioner had failed to exhaust by omitting to exercise his available right of appeal to the Supreme Court. The Court of Appeals refused to pass on the claim holding that it was untimely.

We also notice a recent case where it was apparently assumed that the exhaustion rule no longer requires exercise of an available right of appeal to the Supreme Court, *Rose v. Locke*, 44 U.S.L.W. 3301 (November 17, 1975). After the State's highest court ruled that its statute did not offend the Constitution, the defendant applied directly to the federal district court for a writ. The writ application was treated on its merits by the entire federal system without discussion of the exhaustion rule although it is clear that an appeal was available from the state court directly to this court.

THE CASES LEFT PETITIONER IN DOUBT AS TO HOW HE MUST PROCEED

Did the petitioner now in bar really have a choice? Does the exhaustion rule still require that the right of appeal be exercised wherever available? We do not know because the cases do not tell us. All that petitioner can state for certain is that on April 24, 1973, he was forced to guess as to what the procedural requirements were. Even worse, he was forced to anticipate that the State's attorneys would argue that he had taken the wrong route regardless

of which route he chose to travel. The writ should be granted herein for reason that such doubts should not be allowed to linger.

> "The issue of exhaustion of remedy * * * [is] of vital concern to those who would seek the protection of the Great Writ * * * doubts respecting this issue should not go unresolved." *Darr v. Burford*, supra, 203.
>
> "The line drawn should be bright and clear, so that litigants * * * will not be exposed, * * * to procedural traps operating to deprive them of their right to a District Court determination of their federal claims." *England v. Med. Exrs.*, supra, 418.

If petitioner had been placed upon unequivocal notice on April 24, 1973 that the exhaustion rule did not apply and he was entitled to immediate habeas corpus but if he appealed directly to the Supreme Court, there could be no subsequent habeas review, would he have still chosen to go to the Supreme Court? The answer is "NO" and the circumstances are undeniable that the informed litigant would not have freely and voluntarily chosen an appeal under those conditions.

(1) Petitioner had already filed a writ application and had received bail from the United States District Court because the Texas Court of Criminal Appeals on January 10, 1973 denied a stay of mandate for the purpose of taking an appeal to the Supreme Court (J.A.216).

(2) Prior to petitioning for bail in the federal district court, Mr. Justice Powell had denied an application for stay, *No. A-741*. While it was only a straw in the wind, it was not a favorable one.

(3) Bear in mind that it was not a question of whether

or not petitioner should permanently forego the right of review in the Supreme Court. By going directly from the Court of Criminal Appeals to the U.S. District Court, petitioner was, at the most, only postponing that right.

(4) If petitioner chose habeas, he was entitled to a plenary federal judicial review of his federal claims. *Fay v. Noia*, supra. On the other hand, if he chose appeal, he was first required to submit a jurisdictional statement and persuade the Supreme Court to note probable jurisdiction. All available statistics warned him that if he chose the route of direct appeal, the prospects of a plenary hearing were small indeed.

(5) In final analysis, the answer is as obvious as the question whether someone attending the fair would rather have one dart to throw at the balloon or three darts. Habeas offered a far greater opportunity to expound upon the case and three possible forums before which petitioner might proceed. If the route had been clearly marked, the choice would have been obvious.

BEING UNCERTAIN, PETITIONER CHOSE THE ROUTE HE CONSIDERED TO BE BOTH PROPER AND ADVANTAGEOUS

Petitioner does not argue that he ever believed to a moral certainty that the filing of an available appeal was mandatory. He does urgently present that the law was and is so uncertain that he was unable to determine the required course of action.

(1) *Hawk* states that review by appeal or certiorari is the only available remedy save in "exceptional circumstances." *Darr* indicated that habeas would lie after certiorari was denied and *Brown v. Allen*, supra, directly held that it would. But both cases were silent with respect

to appeals. From all that we can find after diligent research the Supreme Court has never directly overruled *Hawk's* declaration that where the Supreme Court "has declined to review" an appeal from "the state court's decision," habeas will not issue upon the same question.

(2) Petitioner was thus forced to apprehend that, if he failed to appeal, it might be held that he had bypassed his only available remedy. He did not and does not believe that "appeal is the exclusive remedy" fits any of the prevailing notions concerning the proper dimensions of a federal writ. But, be that as it may, *Hawk* remains as the last direct unequivocal pronouncement on the subject and petitioner would have been exposing the case to a significant risk if he ignored it. The existence of this risk, even though petitioner considered it as minimal, weighed in favor of exercising the appeal.

(3) Both *Hawk* and *Darr* flatly declare that the right of appeal, where available, is a component of the exhaustion doctrine and these rulings likewise have never been withdrawn. The risk of a finding that "you failed to exhaust" loomed considerably larger than the risk of a ruling "appeal is the only remedy." Obviously, the existence of this risk weighed heavily in favor of the appeal.

(4) Another consideration weighing strongly in favor of the appeal was tactical. Petitioner wished to pursue all avenues open to him. What kind of a card player throws away his fourth ace on the assumption that he can win with three? All of the modern cases from *Fay v. Noia* to *Neil v. Biggers*, 409 U.S. 188 (1972) have emphasized the sweep of the writ and the absence of res judicata. The texts have underscored the erosion of practical distinctions between certiorari and appeal. Can petitioner be criticized or condemned for adopting the tactically advantageous course?

THE SUPREME COURT DECLINED TO ALLOW PETITIONER TO EXTRICATE HIMSELF

After the court ruled summarily upon his jurisdictional statement, petitioner decided that he would be best advised to extricate himself from the Supreme Court, if possible. On October 22, 1973, petitioner filed the attached petition to rehear and allow voluntary dismissal under Supreme Court *Rule* 60(2) (P.A.24-26). However, the Court denied the petition, *Howell v. Jones*, 414 U.S. 1052 (1973) (P.A.26). The reason for the denial is "opaque." The Court might have viewed as groundless the apprehensions expressed by petitioner that the District Court might hold itself precluded by the Supreme Court's order. The Supreme Court might have considered the appeal to have been necessary for exhaustion purposes. The Court might even have considered appeal the only method to test the constitutionality of state criminal statutes. For certain, the Supreme Court failed to relieve petitioner from his choice of the wrong route; assuming as the Court below has held that petitioner's chosen route was the wrong one.

As we urged under "Summary of Argument," Congress intended that those entitled to address the Supreme Court by appeal should have greater rights of review than certiorari petitioners. Petitioner's view in April of 1973 was and is that an appellant must be allowed to proceed both by appeal and habeas; otherwise, his rights are not superior, they are inferior. Petitioner asked himself in 1973 as he now asks:

> "All the leading cases now agree that those whose deprivations raise only certiorari questions have four darts available to throw at the balloon. Does it make

sense that deprivations raising appellate questions be limited to three darts or two or one?"

At common law, it was fatal to the case to sue out the wrong writ. Supposedly, such fictions have been abolished, but petitioner's case reflects that vestiges remain. However, the real hardship of the case is that petitioner travelled an uncharted course with pitfalls on either side. For this reason, he should have relief whether he guessed rightly or wrongly; simply because an applicant for the Great Writ should not be forced to guess at all as to the course he must follow.

WHERE THE LINE IS NOT BRIGHT AND CLEAR, A LITIGANT SHOULD NOT BE PENALIZED FOR THE CHOICE HE MAKES

The Fifth Circuit has held that petitioner waived his right to habeas review by filing a jurisdictional statement with the Supreme Court. The terminology of waiver is not express but it is inevitably implied. This Court has repeatedly held that constitutional rights may only be waived knowingly and intelligently. "This Court has always set high standards of proof for the waiver of constitutional rights" *Miranda v. Ariz.*, 384 U.S. 436, 475 (1966).

Fay v. Noia emphasized that the power to dispense the writ must be generously construed. Can the Court do less than it did for civil litigants caught in a similar web:

> "The rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants. As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that *Windsor* required them to do so. That view was mis-

> taken and will not be available to other litigants who rely upon it after today's decision. But we cannot say, in the faces of the support given the view by respectable authorities, * * * that appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action." *England v. Med. Exrs.*, supra, 422.

England declares that a party's rights should not be forfeited for following the wrong route when there were no sign posts to guide him. Petitioner should be accorded the same relief. There are various modes which the Court can employ to allow relief:

(1) The direct approach is often the best approach. The Court could simply grant the writ and proceed to pass upon the constitutionality of the Texas Criminal Contempt Statute.

(2) We recognize that it is the policy of the Supreme Court not to reach issues left undecided in the court below but to remand for initial determination. We present that the final determination of the Texas Court of Criminal Appeals should suffice in this instance. Remanding the case to the District Court or the Court of Appeals (they both held themselves precluded from considering petitioner's constitutional claims) would, in the present case, constitute an excessive obeisance to the formalities of procedure.

(3) If the Court decides to remand for consideration of the statutory issues, it must determine whether those issues should be initially decided in the District Court or the Court of Appeals. In any instance, the courts below must be cautioned that, insofar as this case is concerned, the previous summary dismissal by the Supreme Court shall not be given conclusive effect.

(4) If it be held that petitioner traveled the wrong route, but that he should have relief on account of inadequate guidance, then petitioner suggests that the most procedurally proper method for granting review in the lower courts would be to set aside the Supreme Court's prior order dismissing for want of a substantial federal question. In this connection, petitioner is filing a petition for rehearing out of time in the appeal case, No. 72-1448. For the reasons given, that petition should be granted, the previous order of this Court should be set aside and petitioner allowed to enter a voluntary dismissal under Supreme Court *Rule* 60(2). This will wipe the slate clean and petitioner will be free to argue against the Texas statute in the Court below without prejudice to the Supreme Court's prior ruling.

HABEAS CORPUS IS NOT GOVERNED BY ORDINARY CIVIL RULES

Petitioner does not concede from any of the foregoing argument that he did, in fact, choose the wrong route when he filed a jurisdictional statement before proceeding on habeas. In ruling that an appeal bars habeas, the Fifth Circuit took no notice whatever of the peculiar nature of the writ. The Court assumed rather than decided that the rule in ordinary civil cases is applicable to habeas. Admittedly, there are several recent cases in the lower federal courts reaching the same conclusion, but on analysis, every one suffers from the identical weakness.

In *U.S. ex rel. Epton v. Nenna*, 446 F.2d 363 (2-N.Y. 1971), the Court held that it could not review the constitutionality of the New York anarchy law because of the prior

dismissal of an appeal for want of substantial federal question:[21]

> "These questions are *very substantial,* but we do not feel that we are free to rule on them in this case. The District Court ruled that the Supreme Court had either decided them or had held that they should not be reached and that this was binding on a lower court *under the doctrine of law of the case* * * *. We agree.
>
> * * * * * * * * *
>
> "In light of the substantiality of some of these contentions, we are comforted in the thought that if our deference to the prior Supreme Court ruling in this case is undue, that tribunal — to which appellants may obviously apply — is the proper forum to so decide."

The Court noted that the Supreme Court's prior ruling might have been bottomed on the concurrent sentence doctrine, subsequently modified in an unrelated decision, but the Court refused to consider the matter because the Court considered that the subsequent decision "does not answer the first branch of *the law of the case problem* here." The court placed reliance primarily upon ordinary civil cases and disregarded the special characteristics of the writ.[22]

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[21]Petitioner again urges that if he chose the wrong route, it was because the authorities failed to show the proper route. Just as petitioner did not have the benefit of a Supreme Court decision, he had no guidance from the lower courts. Of the circuit and district decisions here discussed, **Epton** was the only one to appear in print prior to April, 1973 when this petitioner filed his jurisdictional statement. **Smith, Mercado, Connor** and **Wojtycha,** none of them appeared until later. Petitioner considered **Epton** as inadequate for the reasons here stated.

[22]**Davis v. U.S.,** 417 U.S. 333 (1974), has badly undermined **Epton** as authority on the law of the case aspect. Held in **Davis,** law of the case is but one branch of the law of res judicata; res judicata has no application in habeas.

In *Smith v. Slayton*, 369 F. Supp. 1213 (W.D. Va. 1973), it was held that previous dismissal for want of a substantial federal question precluded attack on the Virginia marijuana statute. The sole authority was *Epton*.

In *Mercado v. Rockefeller*, 502 F.2d 666 (2-N.Y. 1974), the Second Circuit again held that summary orders of the Supreme Court are binding in subsequent habeas actions, citing *Epton*, plus an ordinary civil case, plus another of its own habeas decisions, which on close reading, is not in point.

On May 28, 1975, the Eighth Circuit held:

> "The Supreme Court's dismissal of appellant's appeal for want of a substantial federal question constituted a finding of insubstantiality * * *," *Connor v. Hutto*, 516 F.2d 853 (8-Ark. 1975).

The authorities relied on were *Epton*, *Smith v. Slayton*, and two other cases merely stating the ordinary civil rule.

On the very next day, May 29, 1975, the Third Circuit held to the same effect in *Wojtycha v. Hopkins*, 517 F.2d 420 (3-N.J. 1975). The authorities relied upon were *Epton*, *Mercado* and three other cases reciting the ordinary civil rule.

Three of the foregoing cases holding that a prior summary disposition precluded habeas review were brought here on certiorari and certiorari was denied. *Epton v. Nenna*, 404 U.S. 948 (1971), "Mr. Justice Douglas is of the opinion that certiorari should be granted * * *." *Mercado v. Carey*, 420 U.S. 925 (1975). *Connor v. Hutto*, 44 U.S.L.W. 3264 (Nov. 4, 1975).

As stated, the Fifth Circuit also placed its reliance upon the ordinary civil rule. The Supreme Court is thus presented with a situation where the question in hand has been

considered in five circuits demonstrating that it is a lively issue worthy of the Supreme Court's attention. Every one of these decisions placed prime reliance upon the rule prevailing in ordinary civil cases. No notice has been taken of the fact that habeas corpus is the primary safeguard of human liberty, that res judicata has no application in habeas and that the habeas petitioner is entitled to "plenary federal judicial review" of his federal claims. Petitioner urges that ordinary civil cases are of little value in determining the rights of a habeas petitioner and the writ should be granted to explore the question. The question is of particular concern to the Supreme Court because it relates to the practice of the Supreme Court itself. *The power to declare the effect of the Supreme Court's own orders should not be relegated to the lower courts.* The question should be decided by the Court itself and decided in clear enough terms that persons contemplating an application for Supreme Court review may be apprised of the situation with all available clarity.

THE COURT BELOW FAILED TO DISTINGUISH BETWEEN RES JUDICATA AND STARE DECISIS

In an unbroken line of decisions, this Court has reaffirmed from earliest times the proposition that there is no res judicata in habeas corpus. There are three major restrictions upon habeas applicants designed not for the purpose of restricting the rule against res judicata but simply designed for the purpose of insuring orderly procedure and protecting the courts from pointless consideration of petitions with no hope of success. Thus, (1) the petitioner is required to present all of his claims at a single time, (2) he may not repetitiously file the same claim over

and over again and (3) if the petition is frivolous on its face, it may be disposed of peremptorily. We mention these propositions only for the purpose of distinguishing them. They do not qualify the unyielding principle that there is no res judicata in habeas corpus.

The Court below quoted *Fusari v. Steinberg*, 419 U.S. 379, 391, 392 (con. op.) to the effect that a summary order " 'settled the issues for the parties' " (P.A.35). The statement is undoubtedly true with respect to ordinary civil litigation where res judicata applies, but it has no application to habeas. Apparently, the Court failed to grasp this fundamental distinction. As long as the prisoner labors under the yoke of a conviction, the courts of the United States remain open to examine the constitutional validity of the conviction. The issues are never settled "for the parties" until the imprisonment is past or the defendant discharged.

At the same time, it has never been contended that the rules of stare decisis, the principle that all cases shall be decided in accordance with precedent are inapplicable to habeas. Of course, they are. However, we find no habeas decision sharply drawing the distinction and for this reason alone we present that the writ should be granted.

Res judicata and stare decisis are parallel doctrines but they are rooted in entirely different policies and therefore differ in many aspects. Res judicata is rooted in the principle of finality and must be rigid and unyielding to accomplish its very purpose. It matters not if the judgment be manifestly unfair and in diametric opposition to ruling precedent. If the point of finality has passed, the aggrieved party may have no relief. The doctrine has singular application to the usual civil case where private litigants must

bear the brunt of the litigation and justice delayed is more often than not, justice denied. But, as long as the defendant carries the onus of an unjust conviction, res judicata has no application.

On the other hand, stare decisis is grounded not upon principles of finality but upon principles of fairness. Equal justice under the law requires equal application of the rules of law. However, the rules of law in a dynamic society are always flexible, never rigid. The debate as to the proper rule of law is and should be unending. The only objective of stare decisis is to develop a just rule and apply it evenly.

Drawn as closely as possible, the question, as we see it, is not whether a prior summary order of the Supreme Court has "settled the issues for the parties." This is a complete misstatement of the problem. The question, carefully drawn and carefully stated, asks: *how much weight as precedent must the District Court and the Court of Appeals give to a prior summary order of the Supreme Court; particularly with regard to federal habeas corpus brought on behalf of a state prisoner?* The *Epton* line of cases casts no light on this point because they wholly failed to reach it.

We would most urgently present that it matters not whether the previous summary order was rendered on the appeal of the instant petitioner Charles Ben Howell, or that it was rendered upon the appeal of one Sam Spluck, being wholly unrelated proceedings. Logic compels this conclusion if we are to accept the principle that there is no res judicata in habeas and that we are only concerned with the question of stare decisis or precedent. The law has never attached any significance to the names of the parties securing a precedent upon a particular point.

Brown v. Allen, supra, is illustrative. The minority there contended that inasmuch as the Supreme Court had previously denied certiorari on the very same cause of action, the lower courts should be allowed to give "some consideration" to such previous denial. In other words, they contended for a qualified application of the notion that the issues had been previously "settled for the parties." However, the view was firmly rejected and the universal doctrine that the denial of certiorari has no signifacance as precedent was confirmed.

The approach of the Court below, to declare that summary orders of the Supreme Court are "on the merits," ergo, petitioner is concluded thereby, constitutes an overly simplistic approach to a complex problem. Strictly speaking, the question whether or not a ruling was on the merits pertains primarily to the law of res judicata; the general rule being that a prior judgment is not res judicata if it is not based on the merits.[23]

Herein lies another distinction between res judicata and stare decisis which the *Epton* line of cases has failed to

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[23]We suggest that this is but one example of legal terminology possessed of variable meanings depending upon the context in which the term is employed. The commonest usage of the term is merely to distinguish from those decisions grounded upon procedural points. Contrariwise, it appears to us that the Supreme Court originally coined the term in its practice as a shorthand means of distinguishing those cases, where it has statutory authority to refuse to hear the case without regard to merit, from instances where it has a duty to hear cases of sufficient merit "to require plenary consideration," Supreme Court **Rule 15(1)(e)**. Put another way, the statement that votes are "on the merits" is just another means of saying that votes are "on the substantiality of the case." Absolutist usage of the terminology begs the essential question at hand. Where is the threshold of substantiality or merit necessary to obtain review? Over the years, it appears to have been an ascending threshold. And, what is the precedential value of a summary disposition, particularly in habeas? As the threshold rises, the value as precedent and the strength of the summary order as a declaration of "no merit" must, a fortiori, decline.

explore. *Res judicata concentrates upon what the Court did rather than what it said.* A decision "on the merits" will be res judicata even if the reasoning be patently absurd. Conversely, stare decisis looks primarily to the Court's reasoning; what it said.

It is a generally accepted proposition that whenever an appellate court, any appellate court, fails to write an opinion, its decision furnishes little or nothing as precedent. It was stated below that "approximately one-third" of the Fifth Circuit's caseload is disposed of without oral argument and without written opinion. Following the reasoning of the Fifth Circuit, each of the summary affirmances of that Court constitute a binding precedent upon the district courts of the circuit.[24] Various lawyers are aware of the nature of the issues involved in those summary affirmances. Can they, by digging out the briefs and the papers, demonstrate what issues were involved and argue the summary affirmance as a binding precedent? We doubt that much reliance will be placed thereon. Or, assuming that an enterprising publisher commences publication of the issues involved in these summary affirmances, would the courts of the circuit really consider themselves bound to follow the precedents distilled by this process? We think the answer to be clearly negative. In fact, some of the circuits flatly forbid the use of their unpublished rulings as precedent.

Where the courts of appeals summarily affirm, it is generally accepted that they have created little or no precedent. On the other hand, it is urged that summary orders

[24]And also a binding precedent over all other panels of the circuit. The Fifth Circuit has a rule which forbids one panel of the circuit to rule contrary to another; only the Court en banc may overrule a prior decision of another panel, **Popeko v. U.S.**, 513 F.2d 771 (5-Tx. 1975).

of the Supreme Court create binding precedents. We fail to see the distinction. In each instance, the rulings are "opaque" and the courts have not had the benefit of plenary consideration, normally including full briefs and oral argument and they have not subjected themselves to the discipline of presenting a reasoned opinion.

In ordinary civil actions, even the denial of certiorari "unquestionably settles the issue presented as between the parties and is an actual adjudication * * *" (P.A.35). To this extent, the denial of certiorari is also a decision "on the merits." This is the rule wherever the law of res judicata is applicable. But, it is also unquestionable that the denial of certiorari does not establish any precedent. Perhaps the Supreme Court is not prepared to go as far as construing the precedential effect of its summary orders. However, in the field of habeas corpus, the peculiar nature of the writ and the petitioner's right to a plenary federal judicial review forbids the lower federal courts from treating summary orders as conclusive.

THE PRACTICAL VALUE OF SUMMARY DISPOSITIONS AS PRECEDENT CONTINUES TO DECLINE

One of the great problems in understanding the law is the lack of concreteness in legal terminology. That a document or a statute be described as "void" does not necessarily mean that it is utter waste paper. The term "jurisdiction" is ordinarily equated with the term "power," but physical power cannot be the test. There are instances where courts have been held without jurisdiction when their own officers have been in possession of the res in litigation.

The Courts below have emphasized that this petitioner's

case was not merely dismissed, it was dismissed "for want of a substantial federal question." However, we find no all-inclusive definition of "substantial federal question." It has been repeatedly held that a federal *district* court may not dismiss an action for want of a substantial federal question unless the federal claim is "absolutely devoid of merit" or "wholly frivolous" or "clearly foreclosed by prior decisions of the Supreme Court," 13 Wright, M. & C. *Fed. Prac.*, 426-430 (1975).

At one time, it appears that the Supreme Court employed the term in the same manner in its own practice. In *Equitable Life v. Brown*, 187 U.S. 308, 311 (1902), it was held that cases would be dismissed if the question presented "is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so exclusively foreclosed by a decision or decisions of this Court as to leave no room for real controversy." While the Supreme Court continues to employ the same terminology, it is clear that the meaning conveyed has changed substantially over the years.

Forty-five years ago, (then) Professor Frankfurter wrote:

> "Plainly the criteria of substantiality is neither rigid nor narrow. The play of discretion is inevitable, and wherever discretion is operative in the work of the Court, the pressure of its docket is bound to sway its exercise." Frankfurter & L., *Business of the Supreme Court*, 44 Harv. L. Rev. 1, 12-14 (1930).

Twenty-two years ago, Mr. Justice Frankfurter stated:

> "[Through the statutes providing for review by certiorari] supplemented by the Court's own invention of the jurisdictional statement in relation to the narrow scope of residual appeals, the Court became complete

master of its docket. The governing consideration was authority in the Court to decline to review decisions which, right or wrong, do not present questions of sufficient gravity. Whatever the source of these questions, whether the common law, statutes or the Constitution, other cases of obvious gravity are more than enough to absorb the Court's time and thought." *Brown v. Allen*, supra at 491 (Sep. Op.).

Twenty-one years ago, Mr. Chief Justice Warren stated:

> "It is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari. * * * In the absence of what we consider substantiality in the light of prior decisions, the appeal will be dismissed without opinion for oral argument." Warren, Hon. Earl, Address to ALI, quoted in *Supreme Court's New Rules*, 68 Harv. L. Rev. (1954) 20, 51.

The pressure of its docket continues to increase. Twenty-one years ago, Mr. Justice Douglas protested "a growing practice of the Court of diluting the Act of Congress which gives us jurisdiction of appeals." *Linehan v. Waterfront Comm.*, 347 U.S. 439 (1954) (dissent).

Mr. Justice Brennan stated in *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959), relied on below, that the Court's practice in considering a jurisdictional statement "is quite similar to its well known one on applications for writs of certiorari," and that the accepted "rule of four" applies both to appeals and to certiorari. Insofar as certiorari is concerned, our understanding is that cases are not placed on the conference docket and no vote is ever taken unless one or more of the judges so requests. We find no authori-

tative discussion but we wonder if the identical practice is not followed with respect to appeals.

In December of 1972, the Freund Commission concluded:

> "The discretionary-mandatory distinction between certiorari and appeal has been largely eroded. The concept that all appeals are argued while most certiorari cases are disposed of summarily has not been true for many years. A study made a decade ago showed that the Court heard argument in 22.8% of the cases brought to it by appeal * * * In recent years the proportion of appeals that were heard on oral argument * * * [has] run from 12% in the 1966 Term to 23% in the 1964 Term. These percentages would be much lower if direct appeals from three-judge and single-judge district courts were not included; * * *
>
> "In fact, then, * * * *there is no substantial difference between certiorari and appeal from the standpoint of gaining a full hearing,* * * *." Caseload of the Supreme Court*, 57 F.R.D. 573, 595-596.

Insofar as appeals from state courts are concerned, it is stated that in 1960, 87% of all appeals were disposed of summarily. *Id.* 604. Presently, the percentages would undoubtedly be above 90%. It is obvious that necessity has made the test of "substantial federal question" ever more stringent as the case load of the Supreme Court has mounted.

Dean Griswold has very recently concluded:

> " 'Appeal by Right' Has Virtually Disappeared.
>
> "Another way in which justice has been rationed under

current conditions is found in the virtual disappearance of the distinction between certiorari and appeal. * * *

"With few exceptions, appeals are treated as discretionary, and are routinely dismissed 'for want of a substantial federal question.' When this phrase was developed it had a real meaning. * * *

"Very slowly, over a period of many years, the Court's approach to appeals has completely changed, due, of course, to the pressure brought to bear on the Court by the great number of cases filed. * * *.

"* * * The Court would be in an impossible situation if it accepted full compulsory review in all cases where appeal is provided by statute. * * * One can have great sympathy for the Court. Yet, it is clear that this is another, and important, way in which the Court has rationed justice as part of the process of keeping itself from being overworked." Griswold, *Rationing Justice*, 60 Cornell L. Rev. 335, 344 (1975).

THE COURT HAS RECOGNIZED THE DECLINE IN PRECEDENTIAL VALUE OF APPEALS

Insofar as ordinary civil litigation is concerned, the Court has recognized that summary dispositions are of lesser value as precedent.

"This case, therefore, is the first opportunity the Court has taken to fully explore * * * [the issue] in a written opinion * * * [The summary decisions] are not of the same precedential value as would be an opinion of this Court * * *. Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law. Having now had an opportunity to more fully consider the * * *

issue after briefing and argument, we disapprove * * * [of our previous summary decisions.]." *Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974).

Regarding the value of summary orders as precedent, it almost seems as if it is a question of whose ox is being gored. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), and again in *Edelman*, the Court brushed aside precedent based upon summary orders. But, in *Richardson v. Ramirez*, 418 U.S. 24, 53-54 (1974), this Court placed substantial reliance upon two previous summary orders. Strangely enough, the lower court decisions being summarily upheld were based upon previous denials of certiorari. The dissent protested:

"* * * Dictum is not precedent and as * * * [the Edelman decision] has only recently reminded us, summary affirmances are obviously not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Id.* 83.

The remarks of the Chief Justice, quoted by the Fifth Circuit, are more fully quoted as follows:

"* * * We might well make explicit what is implicit in some prior holdings * * * [such as Gibson and Edelman]. When we summarily affirm without opinion, the judgment of a *three-judge District Court* we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and *is not to be read as a renunciation* by this Court *of doctrines previously announced* in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court *has not hesitated to discard* a rule which a line of summary affirmances may appear to

have established." *Fusari v. Steinberg,* supra, 391-392 (Conc. Op.)

Petitioner is uncertain exactly how to read *Hicks v. Miranda,* —— U.S. ——, 95 S.Ct. 2281 (1975), for reason that the Court failed to distinguish its pronouncements in *Gibson, Edelman, Richardson* and *Fusari* nor does it discuss any of the numerous statements by the commentators and the lower courts to the effect that summary orders have frequently proved to be a "shaky guide to the outcome of later full-dress consideration," *Jordan v. Gilligan,* 500 F.2d 701 (6-Oh. 1974).[25] Whether or not *Hicks* turns out to be the last word in the "lively disagreement among respected constitutional scholars,"[26] it is clear that habeas cases present special considerations which limit or exclude its application.

THE NATURE OF THE REMEDY PRECLUDES THE USE OF SUMMARY ORDERS AS BINDING PRECEDENT

Since stare decisis is a flexible doctrine and habeas corpus is the guardian of human liberty, it is submitted that stare decisis should be applied more lightly and with greater discretion in cases of habeas than in ordinary civil litigation. This approach is mandated by Mr. Justice Holmes' famous declaration that:

"* * * Habeas corpus cuts through all forms and goes to the very tissue of the structure * * * and although

[25]See also **Dillenburg v. Kramer,** 469 F.2d 1222 (9-Wash. 1972), **Rios v. Dillman,** 499 F.2d 329 (5-Tx. 1974), **Wager v. Lind,** 389 F. Supp. 213 (S.D. N.Y. 1975).

[26]Quoting from the district court opinion in the **Epton** case, 318 F. Supp. 899, 906, fn. (S.D. N.Y. 1970), which opinion contains a listing of leading articles on the subject.

every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346 (1915).

Please bear in mind that on the previous appeal, the Supreme Court only ruled upon a jurisdictional statement. No appeal was ever really had. Supreme Court *Rule* 15(1)(e) burdens the potential appellant to demonstrate "why the questions presented are so substantial as to require plenary consideration with brief on the merits and oral argument for their resolution." Obviously, this petitioner did not receive full appellate review on his previous trip to this Court. It is literally true to say that he attempted to appeal, but he was denied the right to do so. All that can be stated with assurance about petitioner's prior attempted appeal was that petitioner failed to receive four affirmative votes in favor of noting probable jurisdiction.

In *Brown v. Allen*, supra, Justice Jackson said:

"Neither those outside of the Court nor on many occasions those inside of it, know what reasons lead six Justices to withhold consent to a certiorari," *Id.* 542-543 (1953) (Dissent).

Mr. Justice Frankfurter and Mr. Justice Jackson could not agree upon the case, but they were in agreement on this point:

"* * * we know best how puzzling it often would be to state why the Court denied certiorari even when we are party to the denial," *Id.* 489.

The same may be said with respect to the summary disposition of jurisdictional statements. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), it was stated that summary orders are frequently "somewhat opaque," *Id.* 576. The Court was

there forced to grope for the grounds to distinguish a previous summary order.

If res "judicata" or "law of the case" or "settles the issues for the parties" be the test, it is unnecessary to know the grounds of the Supreme Court's summary disposition. But, here we have a petition for the Great Writ turned aside for reasons they know not why, first by the United States District Court and then the United States Court of Appeals. They cannot know why because, as the Supreme Court concedes, it often does not know why. The Court below did not go to the tissue of the structure and they could not without going to the underlying merits of petitioner's claims.

Fay v. Noia, supra, emphasized the right of the petitioner to "the fullest opportunity for plenary federal judicial review." A plenary hearing before the District or Circuit Court might disclose additional bases for petitioner's constitutional attack upon the Texas Criminal Contempt Statute. At a minimum, petitioner will have an expanded opportunity to urge his case over the limitations inherent in a jurisdictional statement. Until petitioner has received a full and reaching evaluation of his case, the requirements of the writ have not been met.

> "A precedent which appears to some Justices, upon the preliminary consideration given a jurisdictional statement, to be completely controlling may not appear to be so to other Justices. Plenary consideration can change views strongly held, and on close reflective analysis precedents may appear inapplicable to varying fact situation," *Ohio ex rel. Eaton v. Price*, supra, 248.

England v. Med. Exrs. did not involve criminal pro-

ceedings or habeas corpus, but the observations there made are equally applicable:

> "It is true that, after * * * rejection of his federal claims by the state courts, a litigant could seek direct review in this court * * * but such review, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination * * * to which the litigant is entitled in the federal courts." *Id.* 416-417.
>
> "* * * [Port Authority Bondholders v. Port of N.Y., 387 F.2d 259 (2-N.Y. 1967)] was a civil case where the court had to determine the *precedential* effect of a prior Supreme Court dismissal of a different case presenting the same issues as the case now before the lower court. It is the position of this Comment that a district court judge should reach a different conclusion when attempting to determine the res judicata effect of a Supreme Court dismissal of a case in the criminal context, where the prisoner's life or freedom is at stake. *Federal Habeas: "Actual Adjudication,"* 45 U. Col. L. Rev. 315, 325 (1974).

Habeas corpus, in light of its basic nature and role, has been liberally construed and kept unhampered by procedural niceties. Like the precious rights of the *First Amendment,* the writ too needs "breathing space" if it is to function effectively. In *Darr v. Burford,* supra, 203-204, the court stressed that a "favorable attitude toward procedural difficulties" accorded with the scope of federal habeas corpus and observed that "federal courts have long disregarded legalistic requirements in examining applications for the writ." See also *Smith v. Bennett,* 365 U.S. 708, 712 (1961): "We repeat what has been so truly said of the

federal writ: 'there is no higher duty than to maintain it unimpaired.' "

Recapitulating, petitioner urges as follows:

(1) An unbroken line of cases from *Fay v. Noia* forward establish that a habeas petitioner is entitled to "plenary federal judicial review of his federal claims." Further, all procedural doubts are to be resolved in favor of the petitioner.

(2) Summary orders of the Supreme Court based only upon the examination of a jurisdictional statement and rendered without argument or opinion simply do not constitute the plenary federal review to which a habeas petitioner is entitled.

(3) Stare decisis, unlike res judicata, is a flexible doctrine. It must yield to the extent necessary to provide a federal habeas petitioner with the plenary federal review to which he is entitled.

(4) Of course, the district court has the obligation to rule in the same manner that the district court feels that the Supreme Court would rule *on and after a plenary hearing*. But, we cannot conceive of a case, civil, criminal, at law, in equity or admiralty, where the District Court has any less obligation.

(5) This, we present, is the approach which the District Court below and the Court of Appeals, as well, should have taken. Plenary review should have been provided. Inasmuch as a jurisdictional statement and opposition had been previously filed with the Supreme Court, the District Court and the Court of Appeals should have reviewed those documents together with any additional authority presented and should then have ruled, not summarily as the Supreme

Court ruled, but *as the lower court believes the Supreme Court would have ruled had plenary review been had* therein. The approach suggested is the only approach which will fully protect the right of a habeas petitioner to a plenary federal review.

CONGRESS DID NOT INTEND TO INCLUDE SUMMARY ORDERS WITHIN THE TERM "ACTUAL ADJUDICATION'

The Fifth Circuit decided that in ordinary civil cases, summary orders of the Supreme Court have effect, either as a res judicata or as a binding precedent (the Court fails to elucidate which) and from there the Court literally jumped to the conclusion that Congress intended the term "actual adjudication" employed in 28 *U.S.C.*, §2244(c) to include summary dispositions. This, we believe to be a clear non sequitur. As petitioner has previously urged, words and terminology do not have fixed or immutable definitions. They convey different concepts in different contexts. We think it is beyond debate that in construing the words employed in a statute, the only inquiry is to the intent of Congress regardless of the meaning which may have been ascribed to the identical term elsewhere.

One of the cardinal rules of statutory construction declares that an effort will be made to reconcile and harmonize all parts of the statute. We do not believe either the Court below or any of the other decisions in the *Epton* line have done so. When carefully read, we note that §2244(c) provides as follows:

> "A prior judgment of the Supreme Court * * * *on an appeal* or * * * certiorari * * * shall be conclusive as to all *issues* * * * actually adjudicated by the Supreme Court * * *."

Plainly, the statute provides, even on appeal, for conclusive effect only with respect to matters that are "actually adjudicated." The statute also plainly contemplates that cases going to the Supreme Court *either* on appeal or certiorari are considered the same in this respect. There is no differentiation. The Fifth Circuit has found a distinction where Congress provided none.

Another fundamental rule of statutory construction declares that the courts must avoid a construction which will render part of the statute into surplusage. With respect to appeals, the opinion below renders the phrase "as to all issues * * * actually adjudicated by the Supreme Court" into mere surplusage. The Fifth Circuit judicially placed a period after the word "conclusive," and judicially erased the remainder of the quoted sentence. This is necessarily so because the Court has firmly held that *all summary orders* of the Supreme Court constitute an "actual adjudication." Putting the matter another way, the Court has judicially amended the above quoted single provision of §2244(c) into two provisions:

(1) "A prior judgment of the Supreme Court * * * on certiorari * * * shall be conclusive as to all issues * * * [that may be] actually adjudicated by the Supreme Court * * *;" [and furthermore,]

(2) "a prior judgment of the Supreme Court * * * on an appeal * * * shall be conclusive as to all issues * * * [presented to] the Supreme Court * * *."

This simply is not what the statute says. If *every* order disposing of an appeal constitutes an "actual adjudication," then the term "as to all issues * * * actually adjudicated by the Supreme Court" has no significance with regard to appeals and is mere surplusage.

A far more reasonable, natural and less strained construction of the statute would be that Congress simply did not consider the fine, technical distinctions between appeal and certiorari. We think that it made no provisions in this respect, and that the matter remains open for the Supreme Court to draw such distinctions as it deems proper.

At this point, the real search is for the intent of Congress and we must again return to the study of semantics. Petitioner suggests that in common parlance the term "actually adjudicated" as commonly accepted and employed by the courts and writers does not encompass summary orders, either of the courts of appeals or of the Supreme Court.

Suppose the proposition were put to judges, lawyers, legal text writers, etc., in the abstract: "If an appeal is summarily dismissed without a plenary hearing and without the delivery of an opinion, would you say that the *issues* in the appeal had been 'actually adjudicated'?" The term *"issues"* must be emphasized. It may not be read out of the statute. Res judicata concerns itself only with the final judgment while stare decisis looks to determine what issues were decided. We think they would almost overwhelmingly say: "No!" Certainly, this would be the reaction if the question were framed in the terms of stare decisis rather than res judicata.

Petitioner believes that in ordinary legal parlance, an *issue* has not been "actually adjudicated" by an appellate court unless the appellate court holds a plenary hearing and delivers an opinion setting forth its reasoning with respect to the particular issue.[27] In the present case, the Supreme

[27]This case would not be a proper vehicle for an attack upon the summary affirmance procedures of the Fifth Circuit because the present case was not handled by summary affirmance. However, the bob-tailed appellate procedure that is gaining pre-eminence in the circuits has not gone without criticism.

Court merely dismissed and there has been no "actual adjudication" of any *issue*.

THE DECISION BELOW IS NOT IN KEEPING WITH THE SUPREME COURT'S DECISION IN NEIL V. BIGGERS

The Supreme Court has construed §2244(c) but one time, *Neil v. Biggers*, 409 U.S. 188 (1972). The Court analyzed the statute and held that within the intendment thereof, a previous 4-4 affirmance was not an "actual adjudication" of the Supreme Court. It was merely a determination to let the lower court's decision stand.

In essence, the dismissal for want of a substantial federal question of this petitioner's direct application to the Supreme Court is nothing more. It is only a determination to let the lower court's decision stand. It is not the full federal judicial review to which a habeas petitioner is entitled. All that petitioner presented to the Supreme Court was a jurisdictional statement and the Court decided, for reasons unknown, to decline jurisdiction. This left the judgment below in effect.

In *Neil*, the Court followed petitioner's theory that the real inquiry is the intent of Congress. The Court stated:

> "The intended scope of the phrase 'actually adjudicated by the Supreme Court' must be determined by reference to the peculiarities of federal court jurisdiction and the context in which §2244(c) was enacted."

The Court held that the real purpose of the statute was to "restrain open-ended relitigation" and to foreclose petitions which would "serve no valid purpose." It concluded that "Congress did not expressly address itself to

the effect of an affirmance by an equally divided Court" and we submit the same with respect to the appellate jurisdiction given to the Supreme Court by 28 *U.S.C.* §1257(2).

§2244(c) was enacted in 1966, *P.L.* 89-711, 80 Stat. 1104 (1966). Petitioner does not have the facilities to conduct extensive research, but we have examined the Court's docket as printed in U.S. Law Week for the first decision day of the term in 1965 and again in 1966 and assume that the results are fairly representative for the entirety of those terms. On October 10, 1966, the Supreme Court made initial decisions to review or not to review in 608 cases of which 33 cases were appeals. On October 11, 1965 there were 488 rulings, 37 being appeals. The ratio for 1966 was approximately 1 in 20 and in 1965 was approximately 1 out of 15. Petitioner submits that appeals constitute such a small part of the Supreme Court's docket that the problem presently under discussion was simply overlooked. The language of the statute as analyzed above supports this conclusion.

This analysis is further supported by examination of the legislative history of §2244(c), 3 *U.S. Code, Cong. & Adm. News*, 1966, 3663. Careful examination of the statutory service fails to disclose any discussion whatever of distinctions between the summary disposition of appeals and the denial of certiorari. The only specific example given therein which casts light upon the meaning of the term "actually adjudicated," is the following part of a letter written by Judge Phillips, chairman of the committee on habeas corpus of the Judicial Conference:

> "State prisoners frequently challenge the validity of their State court sentences by a review on certiorari *granted* by the Supreme Court of the United States. If

> the decision on review is adverse to them and their judgment of conviction is *affirmed* by the Supreme Court, they almost invariably start a new attack on their sentences by an application for habeas corpus in the Federal courts. H.R. 5958, as amended, provides * * * [that the prior judgment of the Supreme Court] * * * shall be conclusive as to all issues * * * actually adjudicated * * *." *Id.* 3667.

The quotation demonstrates that Congress simply did not consider the significance which summary orders of the Supreme Court might possess. The statute, therefore, does not deal with the proposition. Res judicata does not apply to habeas and the case turns upon the question of stare decisis: must summary rulings of the Supreme Court be accepted as conclusive precedent in habeas? The *Neil* case, if it has no other relevance to the matter in hand, squarely reaffirms the proposition that the law of habeas corpus, both statutory and otherwise, must be freely construed in favor of the writ.

The chairman of the committee on habeas corpus further noted that the statute provides that "*after a hearing on the merits of an issue of law*, * * * a subsequent application for a writ of habeas corpus * * * need not be entertained * * *," *Id.* 3667. The key word here is "*hearing.*" Petitioner had no hearing before the Supreme Court and the statute therefore does not apply.

OTHER AUTHORITIES HOLD THAT THE TERM "ACTUAL ADJUDICATION" IS NOT TO BE EXPANSIVELY APPLIED

Neil states that the Court was aided and confirmed in its views by the opinion in *U.S. ex rel. Radich v. Crim. Ct.*,

459 F.2d 745 (1972). That case is somewhat more comparable to the case in bar because the petitioner there came to the Supreme Court by jurisdictional statement. After noting probable jurisdiction, the Court had affirmed by an even split. In the subsequent habeas case, the Second Circuit carefully examined the peculiar nature of the writ, the inapplicability of res judicata, the petitioner's right of plenary federal judicial review and concluded §2244(c) to be inapplicable.

The Court distinguished the statement in *Durant v. Essex Co.*, 74 U.S. (7-Wall.) 107 (1868) that affirmance by an equally divided court was " 'conclusive and binding in every respect upon the parties.' " The ruling is not applicable to habeas, decided the Second Circuit; habeas corpus "being exempt from the doctrine of res judicata, has always stood on a different footing." In the case in hand, the reliance by the Court below on a statement that summary dispositions settle the issues "for the parties" taken from an ordinary civil action is equally inapplicable.

> "The Court treats dismissal of an appeal for lack of a substantial federal question much as it treats denials of certiorari, and in both cases it is difficult to say with any assurance that the prisoner has had his case actually adjudicated by a federal court. As long as dismissal for lack of a substantial question continues to be used as a device to enable the Court to select cases for review on appeal, or as long as there is uncertainty as to the degree to which its appellate jurisdiction is discretionary, such a dismissal should not be considered an actual adjudication." *Federal Habeas: "Actual Adjudication,"* supra, 329.
>
> "Additionally, the district court should consider that habeas corpus is often a better place to develop the

> record necessary for the state prisoner to present his constitutional arguments than on direct appeal to the Supreme Court, and the Court thus has an incentive to defer certain appeals from state court criminal convictions to the federal district court. Also, if any doubts arise, it has been and should continue to be the policy of the courts to decide them in favor of the prisoner and entertain the application for a writ of habeas corpus. See Sanders v. United States, 373 U.S. 1, 16 (1963)." *Id.* 337.

In *Miller v. Carter*, 434 F.2d 824 (9-Ca. 1970), certiorari had previously been granted to the petitioner but after argument, this Court dismissed the writ as improvidently granted. Certainly, such did not occur unless a majority, not simply four members of the court, agreed that the issues which had been actually argued should not be decided. Nevertheless, the Ninth Circuit concluded that nothing had been actually adjudicated within the contemplation of §2244(c).

In *U.S. ex rel. Senk v. Brierley*, 471 F.2d 657 (3-Pa. 1973), the petitioner's first appeal was affirmed on the grounds of non-exhaustion where the technically proper action would have been to vacate and dismiss. The Court relied on the statutory interpretation made in *Neil* and held "the district court is free to consider all * * * [grounds contained in the original petition] without regard to his action on the first petition." Thus, even though the prior petition had been summarily affirmed by the appellate court, it was held to be entitled neither to res judicata nor precedential effect.

The value of *U.S. ex rel. Epton v. Nenna*, supra, as authority is also limited by the fact that it precedes *Neil*.

The Fifth Circuit below and all other cases in the *Epton* line have omitted to discuss the application of *Neil* excepting *Connor v. Hutto*, supra, where the court inserted a footnote:

> "* * * Affirmance [by even split] merely represented that a majority of the Court could not reach any agreement on the issues * * * Conversely, a dismissal for want of a substantial federal question represents that *a majority of the Court has agreed that the issues in the case are insubstantial.*"

In the same vein, respondent argued before the Fifth Circuit that a *unanimous* Supreme Court found that this petitioner's case contained no substantial federal question. The clear assumption, both by the Eighth Circuit and by the respondent herein is that the Supreme Court does not issue summary orders upon jurisdictional statements unless a majority of this Court affirmatively decides that the case is substantial. To the contrary, the authorities indicate that summary disposition ensues unless at least four justices affirmatively vote in favor of review.

It is not permissible "to introduce legal fictions into habeas corpus," *Fay v. Noia*, supra, 439. Speaking with respect to the case now in bar, is it fact or is it fiction that "a majority of the Court has agreed that the issues in the case are insubstantial"? Unless petitioner's previous jurisdictional statement received full and plenary consideration and unless a majority of this Court thereafter agreed that the issues are not only insubstantial but without merit, petitioner has surely not received the plenary federal judicial review to which he is entitled. The courts below erred in treating the summary dispositions as conclusive.

QUESTION FOUR:

THE STATUTE DOES NOT MEET CONSTITUTIONAL MINIMUMS

Effective August 30, 1971, Texas adopted a new criminal contempt statute, *Art.* 1911a, Tex. Civ. Stats. (P.A.44-47). Petitioner argues the invalidity of the statute on seven grounds. The first, second and third grounds are aimed at Section 2(c) providing for the calling of another judge in cases of attorney contempt. The fourth through the seventh grounds are aimed at the statute generally.

The discussion here presented is essentially a condensation of the petitioner's jurisdictional statement in No. 72-1448. In order to allow space for the predicate question concerning the effect of the Supreme Court's previous ruling, 126 pages have been condensed to approximately 30. The jurisdictional statement was filed in the District Court below as a part of the habeas record and is part of the record now on review (J.A. 218-230, R. 381-568). If the Court desires additional information, the jurisdictional statement may be inspected directly. Petitioner will furnish additional copies should they be of use or interest.

(1) *THE STATUTORY PROVISION FOR DETERMINATION OF GUILT OR INNOCENCE "IN THE FIRST INSTANCE" BY THE COMPLAINING JUDGE IS UNCONSTITUTIONAL*

(2) *THE STATUTORY PROVISION FOR SENTENCING BY THE COMPLAINING JUDGE IS UNCONSTITUTIONAL*

This new Texas Criminal Contempt Statute was before the Court in *Maness v. Meyers*, 419 U.S. 449 (1975), see fn. 6., but the prosecution sidestepped the present constitutional challenge by making an agreement before the trial

court for the purpose of that case that "the burden of proof was on the Attorney General."

(a) Sec. 2(c) speaks of when "an officer of a court" (which the Court of Criminal Appeals assumed to include an attorney) is "*held in contempt* * * *," etc. That Court could easily have defined this clause as meaning when the defendant is "*charged*" or "*cited*" or "*accused*" etc. However, the Court adopted a literal interpretation of the term "held in contempt" and interpreted the statute to mean when the defendant is adjudged guilty of contempt, he may have the judgment held in "abeyance" pending "readjudication."

(b) The statute only provides for "*a determination of guilt or innocence*" by another judge. It is wholly silent as to who shall pass sentence and determine the punishment. The Court of Criminal Appeals held that this was the prerogative of the complaining judge subject to "readjudication" by the trying judge as his "guilt or innocence."

(c) The due process concept of a criminal trial is not satisfied by a judgment held in "abeyance" pending a "readjudication" whether he is "actually guilty." The statute is constitutionally insufficient for failing to provide that when another judge is called, it is necessary to "wipe the slate clean" and try the case anew with the accused protected by the presumption of innocence, the prosecution burdened to prove guilt beyond a reasonable doubt and punishment to be assessed without reference to any action of the complaining judge.

THE STATE DOES NOT CONTEMPLATE A PLENARY TRIAL

We have presented above that petitioner did not receive a plenary trial; he was summarily convicted and sentenced on March 3, by Judge Walker, the "Declaration

and Certificate" was treated as "the primary fact finding" and Judge Holland assumed the bench to determine if Judge Walker's "primary fact finding" was "an abuse." The Court of Criminal Appeals approved; held this procedure complied with the Texas Criminal Contempt Statute and overruled constitutional objections. Neither the statute nor the opinion is a model of clarity but it is a fundamental that due process requires criminal statutes; both substantive and procedural, to be clear and certain. A careful analysis of the record before the Court of Criminal Appeals, the "Declaration and Certificate," the record of proceedings therein and the opinion itself will inescapably lead to the conclusion that the "readjudication" contemplates something less than a plenary criminal trial. However, we need not go so far. A criminal procedural statute is constitutionally bad unless it affirmatively protects the rights of the accused. The vice of procedural vagueness is equally as bad as substantive vagueness (the sixth ground of attack upon the statute, infra) if the procedural statute is vague as to whether or not it guarantees the fundamentals of due process. Applying this test, it is abundantly clear that this statute falls short as an affirmative protection for the rights of the accused.

Space limitations preclude insertion of the detailed analysis on pp. 16 through 25 of the jurisdictional statement (J.A. 221-23). Petitioner there called attention to the terminology of the statute and to the "Declaration and Certificate" which states that the court "has found" on March 3, 1972 and "finds" petitioner "guilty." Petitioner urged in the Court of Criminal Appeals that the "Declaration and Certificate" is not a criminal pleading but that it is a judgment signed officially by Judge Walker in his capacity as such. The Court of Criminal Appeals obviously found petitioner's contentions to be correct for it declared

that "the first contempt was imposed" (P.A.17-18) by Judge Walker by issuing a "Declaration and Certificate" (P.A.19) in which "he assessed" (P.A.19-20) punishment "at three days (72 hours) in jail and a fine of $100.00." The Court proceeded to "interpret" the statute as meaning that when the complaining judge "finds" an attorney "guilty" — "and assesses" (notice the conjunctive) punishment, another judge may be called to determine if the accused is "actually guilty;" with the complaining judge to set punishment "likewise, subject to readjudication" just as " 'guilt or innocence.' " The Court stated that Judge Walker having "held" petitioner in contempt (etc.) had "fulfilled all his requirements" for "holding" petitioner "guilty" (P.A.20-21). Speaking with reference to the "four attorneys" conviction, the Court stated that Judge Holland was not required to call another judge "after [not before] he held the petitioner guilty" (P.A.21). The Court further stated that the new statute "did not alter the power" of Judge Walker "to punish" but provided a different forum for an officer "who had been found guilty" (P.A.21-22). In conclusion, the Court stated that the statute "permits" the complaining judge "to assess punishment" but it is not unconstitutional because "such punishment is held in abeyance" (P.A.23).[28]

[28]In support of his habeas petition in the Court of Criminal Appeals, petitioner made affidavit that he had obtained a glance at a confidential letter from Judge Walker urging the "Declaration and Certificate" to be prima facie proof of guilt (J.A. 164-65) and argued disqualification of Judge Holland (J.A. 184-85, 1470-76, 1119-20). While respondent did not brief the point (nor produce the letter), he argued that the letter was "harmless." By upholding the conviction, the Court of Criminal Appeals apparently sustained respondent; the letter could not have been "harmless" unless the Court felt that the Declaration and Certificate did, in fact, constitute prima facie proof. Analysis of headnotes 1, 4, 5 & 9 reflects the annotator's interpretation of the opinion is the same: "no plenary trial required;" the trying judge's only function being to determine if evidence exists which will sustain the prima facie finding of guilt and if the sentence imposed is excessive.

The offense is "inordinately sweeping and vague," while at the same time it is "punished by the harshest procedures known" to the law. The protagonists have attempted to justify the contempt power by euphemistic labeling but the Supreme Court has emphasized that "convictions for criminal contempt are indistinguishable from ordinary criminal convictions." *Bloom v. Ill.*, 391 U.S. 194 (1968). In *Dyke v. Taylor Implement Co.*, 391 U.S. 216 (1968) it was held that criminal contempt punishable in Tennessee by a maximum of ten days and $50 required a criminal trial; case reversed because of introduction of evidence obtained in warrantless search. There is "an increasing propensity on the part of both the courts and Congress to resolve conflicts between the 'demands' of judicial efficiency and due process * * * in favor of the latter." The due process requirements of a contempt trial are outlined in *Constitutional Law: Trial by Jury*, 1967 Duke L.J. 632, 638 (1967). See also *U.S. v. Barnett*, 330 F.2d 369, 404 (5-Miss. 1963) (separate opinion). In *Williams v. Oklahoma City*, 395 U.S. 458 (1969), *Groppi v. Wisc.*, 400 U.S. 505 (1971), *Argersinger v. Hamlin*, supra and *Mayer v. Chicago*, 404 U.S. 189 (1971) the Supreme Court emphasized the serious collateral consequences of small misdemeanor convictions and held that due process minimums are applicable. A disbarment suit is pending against petitioner.[29]

[29]The case of State of Texas v. Charles Ben Howell, No. 74-9611, was filed in the 101st District Court of Dallas County, Texas on October 29, 1974. It alleges the contempt convictions here in issue. It states in conclusion: "Howell was found in contempt of Judge Walker and sentenced to three days' confinement and a fine of $100. Howell was also found in contempt of Judge Holland and sentenced to 30 days' confinement and a fine of $500. Because of such professional misconduct, the Defendant should be disbarred, and his license to practice law should be revoked."

A MAN MAY NOT BE TRIED BY HIS ACCUSER

Inasmuch as the statute allows the complaining judge to participate in the adjudication by according prima facie effect to the "Declaration and Certificate," the statute permits him to participate in the adjudication and violates the principle that a man may not be tried by his accusers. The leading case is *In re Murchison*, supra, stating that no man is permitted to try cases where he has an interest in the outcome, that every procedure which would offer temptation not to hold the balance clear and true violates due process, that justice must satisfy the appearance of justice, that a judge who has been a part of the accusatory process cannot be in the nature of things wholly disinterested in conviction or acquittal and "fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

The Court of Criminal Appeals dismissed reliance upon *Murchison* as "misplaced," apparently because of the statement that *"under some circumstances"* an offender may be summarily punished by the complaining judge.[30] In effect, the Court of Criminal Appeals held: (1) Petitioner has no due process right to a conventional criminal

[30]The Court apparently took the position that (1) Judge Walker could have proceeded summarily and (2) the new statute "**did not alter the power** of Judge Walker." We deny both the premise and the conclusion: As stated previously, "Judge Walker was Disqualified Because of a Personal Dispute With Petitioner," concerning the alleged alteration of court papers, **Johnson v. Miss.**, supra. Also, "Summary Punishment Was Never Permissible: All of the Elements of the Offense Not Being 'Under the Eye or Within the View of the Court,'" **Codispoti v. Pa.**, 418 U.S. 506 (1974) (Dissent), **Cooke v. U.S.**, 267 U.S. 517 (1925). There can be no summary punishment for "failure to disclose;" evidence must be taken as to what was not disclosed. **Cooke v. U.S.** supra; **In re Oliver,** supra. Further, summary punishment was not permissible: there was no urgency where punishment was deferred for more than one year. There must be "overriding necessity for instant action to preserve order" in order to justify "dispensing with the ordinary rudiments of due process." **Codispoti v. Pa.**, supra.

trial. (citing *Murchison*). (2) Therefore, Judge Walker could have summarily convicted. (3) It follows that his participation in the case violated no constitutional principles. Our answer: The one proposition does not follow the other. Summary is a clear exception to due process and summary is only permissible where the exigencies of the situation demand it. We think the new statute is facially bad because it fails to distinguish cases which, *even before the statute,* were not subject to summary procedures. In any instance, the statute as construed is unconstitutional as applied to this petitioner because Judge Walker's case against him was never subject to summary proceedings. In the following sub-section, we present an even more telling reason why the statute is bad.

Constitutional Authority of The Complaining Judge To Convict and Sentence Terminated When His Authority To Act Summarily Was Abolished

Only when the exigencies of the situation require immediate punishment may the summary power be invoked. It is an exception to the ordinary rules of due process based upon the necessity for immediate action. The people of Texas, through their elected representatives have forbidden summary convictions, at least insofar as an attorney or "officer of the court" is concerned. With the repeal of the summary power, the "urgency excuse" for dispensing with the established due process requirements evaporated and the power of complaining judges to participate in the trial of their own cases likewise evaporated. Insofar as the statute permits them to do so, the statute is unconstitutional. "Necessity dictates the departure. Necessity must bound its limits." *Sachar v. U.S.*, supra at 36 (dissent). *Harris v. U.S.*, 382 U.S. 162 (1965). *Offutt v. U.S.*, 348 U.S. 11 (1954). *Codispoti v. Pa.*, supra.

Due Process Requires Notice and Hearing Before, Not After Judgment

A 1963 Texas decision held that a statute allowing adoption without notice to an absent parent is constitutional if the absent parent is allowed to later appear and file motion for rehearing. Case reversed; motion to set aside the decree must be granted and case considered anew. "Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." *Armstrong v. Manzo*, 380 U.S. 545 (1965). Criminal Practice will not accept less. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), a criminal statute shifting the burden of proof in part to the defendant was stricken down. Judge Holland was obligated to set aside Judge Walker's judgment and consider the case anew. He had to wipe the slate clean and restore petitioner to the position he occupied before the "Declaration and Certificate" was executed. See also *Deutch v. U.S.*, 367 U.S. 456 (1961), holding that a congressional certificate of contempt had no probative effect, that the prosecution " 'has the burden of establishing guilt solely on the basis of evidence produced in court' " subject to all " 'safeguards of a fair procedure' " including the " 'presumption of * * * innocence.' " In *U.S. v. Seale*, 461 F.2d 345 (7-Ill. 1972), the complaining judge prepared a "Certificate of Contempt," somewhat similar to within "Declaration and Certificate." The Court of Appeals held:

> "At the remand, the specifications we have upheld as a matter of law should be treated as charges against Seale and have no other effect.
>
> * * * * * * * * *

" 'The presumption of innocence, as in other criminal cases, attaches and all elements of the offense must be proved beyond a reasonable doubt.' " *Id.* 371-372.

A "readjudication" for purpose of deciding if the defendant is "actually guilty" of the offense for which he has been convicted undermines the above due process principles relating to criminal trial.

Due Process Requires An Impartial Tribunal In The First Instance

In *Commonwealth v. Continental*, supra, the award of the original decision maker, held to be disqualified, was overturned even though two successive courts thought the award to be fair; the Supreme Court being of the opinion that an impartial tribunal is required in the first instance. The same principle was held controlling in *Ward v. Monroeville*, supra.

A state may abolish grand juries (*Smith v. Tex.*, 311 U.S. 128 [1940]) or deny the right of appeal (*Griffin v. Ill.*, 351 U.S. 12 [1955]) or otherwise regulate state court practice (*Boddie v. Conn.*, 401 U.S. 381 [1971]) but whatever procedures are established must comply with due process. The new Texas Criminal Contempt Statute as construed by its highest criminal court creates a whole new method of criminal trial, unknown as far as we can determine, not only in Texas, but in the nation. The power to abolish or regulate does not include the power to substitute procedures that do not comply with due process. The statute raises both due process and equal protection questions because all other criminal defendants, even for the most minor infractions, may demand prosecution by an accusatory pleading and conviction at a plenary public trial. Where summary proceedings are concerned, urgency is a valid

excuse but when summary proceedings are abolished, the urgency disappears. There is no rational basis for holding that when another judge is called in contempt, he shall be limited to "readjudication." Due process requires in all cases, that the state shall carry the burden of proof beyond reasonable doubt, requires presumption of innocence and requires a public trial. Contempt should call for greater due process protection, rather than less. The contempt power is too close to the hearts of more than a few judges. Neither due process nor equal protection will admit this watered down form of contempt trial.

(3) *THE STATUTORY PROVISION THAT LAWYERS MAY HAVE TRIAL BEFORE ANOTHER JUDGE DENIES EQUAL PROTECTION*

The discussion under "the statute gives to the lawyer privileges not accorded to his client" is new. The remainder of the discussion hereunder is a condensation of the argument on pages 61-77 of the Jurisdictional Statement (J.A. 227-28, R. 456-72).

This statute, only abolishing summary contempt with respect to those described as "an officer of a court" is class legislation. The record from the Court of Criminal Appeals contains, perhaps inadvertently, a memorandum prepared by court personnel (J.A. 198-201) discussing "the highly interesting question" whether the statute denies equal protection. The writer states "it may take a layman * * * to raise this issue, but it appears that a layman does not get the benefit that 'an officer of a court' does" and is thereby "discriminated against" (J.A. 201). We agree that the statute is discriminatory, but we cannot agree that petitioner has no standing to raise the issue. When he was convicted of an entirely independent charge of contempt

upon Judge Holland, he was denied the benefit of the statute. When the court held that he "lost his status as an officer of the court" (J.A. 205), he certainly gained standing to make an equal protection challenge to the statute.

Absent A Compelling State Interest There May Be No Differential Treatment of Criminal Defendants

It is plain that the statute partially abolishes summary contempt. Grounds (1) and (2) immediately above urge that the procedure substituted fails to comply with the Fourteenth Amendment, but any statute granting the right to recognizance and hearing before another judge is better than no statute at all. Alas, the substitute procedure for "readjudication" is *not available* to 99% of the population. This, we say, is forbidden by the provision that the statutes shall not "deny to any person" the "Equal Protection of the Law."[31] What is more fundamental than the concept that no man shall be deprived of life or liberty other than by the law of the land?

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[31]A statute which applies to only one identifiable group and excludes others must be neither irrational nor invidious, must rest upon some ground having a fair and substantial relation to the object of the legislation. **Reed v. Reed,** 404 U.S. 71 (1971). While some statutes are valid if they possess a rational relationship to a legitimate public policy, when the statute involves "suspect classifications" or "fundamental interests" a strict standard of review is applied, **Developments in the Law — Equal Protection,** 82 Harv. L. Rev. 1065 (1969). The strict standard applies to "fundamental personal liberties" and basic civil rights. Under this standard, the burden is on the state; the classification is invalid unless found to be a necessary means of promoting "a compelling governmental interest." **Shapiro v. Thompson,** 394 U.S. 618 (1969), **Reynolds v. Sims,** 377 U.S. 533 (1964). The classification must not only (a) promote a compelling state interest but also (b) must be necessary to protect that interest. **Bullock v. Carter,** 405 U.S. 134 (1972), **Carrington v. Rash,** 380 U.S. 89 (1965). The Supreme Court has identified numerous fundamental interests during recent years. While the Court has not stated a general formula, it has given special attention to matters which have touched upon a sensitive and important area of human rights.

"All people must stand on an equality before the bar of justice in every American Court." *Chambers v. Fla.*, 309 U.S. 227 (1940).

Many times, statutes are attacked for denial of equal protection in their application. *Yick Wo v. Hopkins*, 118 U.S. 356 (1885) but here the discrimination is on the face of the statute. In *Skinner v. Okla.*, 316 U. S. 535 (1942) (criminal sterilization) it was stated that the law may not lay "an uneven hand on those who have committed intrinsically the same quality of offense." *Griffin v. Ill.*, 351 U.S. 12 (1956) held that indigent prisoners are entitled to a transcript so that they may appeal; indigency "bears no rational relationship" to guilt or innocence. The same principle was applied in *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958), *Burns v. Ohio*, 360 U.S. 252 (1959), *Smith v. Bennett*, 365 U.S. 708 (1961), *Douglas v. Cal.*, 372 U.S. 353 (1963), *Lane v. Brown*, 372 U.S. 477 (1963), *Draper v. Wash.*, 372 U.S. 487 (1963) and *Rinaldi v. Yeager*, 384 U.S. 305 (1966). In *Williams v. Okla. City*, supra, and *Mayer v. Chicago*, supra, the Equal Protection Clause was applied to very minor offenses. *In re Brown*, 439 F.2d 47 (3-V.I. 1971) held that a statute restricting the right of juvenile offenders to appeal denied equal protection.

Williams v. Ill., 399 U.S. 235 (1970) and *Tate v. Short*, 401 U.S. 395 (1971) held that the sentencing practices there involved violated equal protection. *U.S. v. Thompson*, 452 F.2d 1333, 1340 (C.A.D.C. 1971) held that District of Columbia bail requirement more strict than the national bail statute would violate equal protection. "The rights of a criminal defendant are in some sense the most basic of all, since what is at stake is no less than the freedom to be free."

THE STATUTE GIVES TO THE LAWYER
PRIVILEGES NOT ACCORDED TO HIS CLIENT

Bear in mind that both petitioner and his client participated in the alleged crime of "failed to make full disclosure as to all of the facts." Either because Judge Walker had no personal animosity toward her or for other reasons unknown, Mrs. Ralston, the client was never charged with an offense. But assume that Judge Walker convicted them both at his March 3, 1972 hearing. Assume that the client was immediately hauled to jail but that petitioner demanded his statutory right to a recognizance and trial before another judge where he received a light sentence or no sentence at all. Could this be accepted as justice? Obviously not.

Maness v. Meyers, 419 U.S. 449 (1975) is a specific illustration of the discrimination inherent in the statute. The client there declined to testify on advice of his lawyers. The client was immediately sent to jail. The lawyers who received identical sentences remained free under their absolute statutory privilege. By virtue of this privilege, the lawyers obtained a hearing before another judge who assessed considerably more lenient punishment. The lawyers eventually were acquitted by the federal courts. Is this Equal Protection of the Laws?

After seven days, the complaining judge, apparently recognizing the inherent inequity of the situation, ordered that the client also be released "for good behavior." Another judge was never called to hear the client's case. Even though the complaining judge in this instance chose to exhibit leniency, the case clearly brings home the fact that the statute facially denies equal protection. If it be necessary to so urge, petitioner presents client McKelva's case

as clear evidence that the Texas Criminal Contempt Statute is both irrational and invidious.

This Statute Is Special Interest Legislation

Construed in the light of existing practice, the Texas Criminal Contempt Statute provides that all contempt defendants may be summarily consigned to jail *except lawyers*. We can find no statute directly comparable. We ask: If there is no constitutional impediment, why hasn't somebody enacted a similar statute previously? There may be a statute or ordinance somewhere which classifies criminal defendants and extends special privileges to a particular class as patently and openly as the present statute, but we have neither heard of it nor found it. This statute does not serve a "compelling interest" of the state. In fact, it serves no legitimate interest of the state or any legitimate public policy whatever; it serves only the interest of the narrow class upon which it is designed to confer a special benefit.

We would endorse legislation providing for automatic enlargement of misdemeanor defendants pending trial, subject to reasonable limitations. We strongly advocate abolition of summary punishment procedures save in a few extreme instances. The present statute serves neither objective, for 99% of the population is excluded. It gives off the unmistakable aroma of special interest legislation.[32] Certainly, lawyers need to be protected from the ire of a vindictive judge (and any judge can make a mistake), but

[32]It is a well known fact that there is a predominance of lawyers in most state legislatures, and in Congress as well. Statistics concerning the 1971 Legislature are not readily available. The statistics concerning the 1969 Legislature are 20 out of 31 members of the upper house and 55 out of 150 members of the lower house were members of the bar. **32 Tex. Bar. J. 31-42 (1969).** The statistics for the 1971 Legislature would be little different.

so does the general public. In England, a defendant of noble birth could demand a jury of nobility and he was entitled to be hanged with a silken rope. In our country, titles or privileges of nobility are forbidden. *U.S. Constitution, Art. I*, §9(8). The Texas Criminal Contempt Statute establishing special procedures in favor of an "officer of a court" is a silken rope law. It demeans the legal profession and the courts as well, to confer upon an officer of a court any special procedure to determine his guilt or innocence.

(4) *TEXAS LAW WHICH GRANTS JURY TRIAL TO ALL CRIMINAL DEFENDANTS EXCEPT IN CONTEMPT, DENIES EQUAL PROTECTION*

This discussion contains important additional authority plus a condensation of the argument and authorities on pages 77-87 of the Jurisdictional Statement (J.A. 228, R. 472-482).

Without discussion, the U.S. District Court declared that petitioner was not entitled to trial by jury (P.A.29) and cited *Cheff v. Schnackenberg*, 38 U.S. 373 (1966). That case has nothing to do with the Equal Protection Clause.[33] We rely on *Baxstrom v. Herold*, 383 U.S. 107 (1966). The Texas Constitution and statutes (P.A.47-48) categorically provide for jury trial in all criminal cases and a jury is available even upon such a charge as littering a parking lot, punishable by fine alone, not exceeding $200 (*Art.* 482a (4) & 5, Tex. Pen. Code), but not in contempt. See *Freeman v. State*, 186 S.W.2d 683 (Tex. Crim. 1945) and *Turner v. Pruitt*, 342 S.W.2d 422 (Tex. Sup. 1961).

The denial of the accepted criminal procedure, largely a historical anomoly is gradually being cut away in favor

[33]The dissents in **Cheff** and in **Dyke v. Taylor Implement Co.**, supra, present strong due process grounds for trial by jury in this case.

of a conventional criminal trial wherever exigency will permit. Obviously, if the judge is obligated to act immediately, there is valid grounds for denying a jury. When the court does not act until later, we can conceive of none. Historic practice alone is insufficient. Not too many years ago, the death penalty, even without the appointment of counsel, could have been defended as "axiomatic," (see P.A. 22). The Supreme Court has not hesitated to re-examine its Fourteenth Amendment decisions where basic liberties are involved. *Malloy v. Hogan,* 378 U.S. 1, 5 (1964). In *Griffin v. Ill.,* 351 U.S. 12 (1956) it was conceded that there is no constitutional right of appeal but *Griffin* and the numerous subsequent cases cited under subsection (3) upon this question have firmly placed appeal under the Equal Protection Clause. *Jury trial is at least as fundamental as the right of appeal.* It follows as the night the day that the equal protection right to a jury must be as broad as the equal protection right to an appeal.

The fundamental nature of trial by jury was emphasized in *Duncan v. La.,* 391 U.S. 145 (1968) holding that states must provide jury where imprisonment of more than six months is a possibility. A minority of the Supreme Court has urged that jury must be provided *for all but the most trivial* offenses. *Dyke v. Taylor Implement,* supra. *Frank v. U.S.,* 395 U.S. 147 (1969). Texas law on the subject allows jury, *even for the most trivial offenses.* The Equal Protection Clause requires Texas to abolish unreasoned distinctions in the application of its laws. *Bloom v. Ill.,* supra, states: "If the right to jury trial is a fundamental matter * * * it must also be extended to criminal contempt cases. There are no "compelling reasons for a contrary result" *Id.* 207-208.

Antiquity does not insulate a practice from constitutional attack. New cases expose old infirmities which

apathy or absence of challenge permitted to stand. *Williams v. Ill.*, 399 U.S. 235 (1970). By logic, non-summary criminal contempt is more, rather than less appropriate for jury trial. The very nature of the subject matter assures that many judges will possess preconceived notions, will have a natural tendency to identify more with the complaining witness than with the accused and in many instances, even though another judge be called, will be personally acquainted with the complainant. Who would not strike out a venireman with preconceived notions, following the same occupation, and being acquainted with the complainant? Alas, there is no peremptory challenge, not even the right of voir dire, respecting judges. Jury trial also protects the judiciary itself. Contempt receives wide publicity. No type of judicial proceedings has caused more adverse publicity, created greater public dissatisfaction and suspicion of the courts, than the contempt power. The judicial process cannot successfully function if the public "feels that it is a mill that grinds out sometimes justice and sometimes injustice." Judge Simon Rifkind, quoted from *Kutner, Contempt Power — a Proposal for Due Process,* 39 Tenn. L. Rev. 1 (1971).

(5) *TEXAS LAW WHICH GRANTS APPEAL TO ALL CRIMINAL DEFENDANTS EXCEPT IN CONTEMPT DENIES EQUAL PROTECTION*

Petitioner here submits important additional authority plus a revised condensation of the discussion found at pages 88-102 of the jurisdictional statement (J.A. 228-229, R. 483-497).

A district court in California recently ruled that California denied equal protection by the denial of appeal in contempt, *Bell v. Hongisto,* 346 F. Supp. 1392 (N.D. Ca. 1972). Even though the decision presented strong authority,

it was reversed primarily on the premise that in California, review by habeas is substantially as broad as on appeal, *Bell v. Hongisto,* 501 F.2d 346 (9-Ca. 1974). Certiorari was denied, —— U.S. —— (1975). Petitioner urges re-examination of the *Bell* case, particularly in view of the fact that Texas makes no pretense that the methods of review are equivalent.

Another case, almost head on, is *In re Brown*, supra, holding that a juvenile statute denying appeal without special leave denied equal protection. Petitioner also places reliance on *Lindsey v. Normet,* 405 U.S. 56 (1972), holding that the right of appeal is protected by the Equal Protection Clause even in civil actions. The Ninth Circuit considered neither of these authorities.

The Right of Appeal Is Also Fundamental In Cases of Contempt

The district court in *Bell* refused to dismiss contempt as too trivial an offense to warrant the right of appeal stating it could not distinguish penalties flowing from contempt convictions from those flowing from misdemeanor convictions providing for punishment of equal gravity or severity. Nor did the Court think that habeas was an adequate substitute for appeal, "the procedural and substantive incidents * * * are not coterminous." It was also pointed out that other misdemeanor defendants are entitled to both appeal and habeas corpus and the availability of habeas in the one instance and denying it in the other giving one defendant two bites at the apple and the other defendant only one was itself a denial of equal protection. The court also turned aside arguments that "the dignity of the Court justifies summary disposition" indicating it considered the distinction to be merely historical. It was emphasized that the federal courts have long allowed con-

tempt appeals without the debasement of their judicial system.

The Ninth Circuit dismissed the *Griffin* line of cases as "based on wealth." These cases may not be read so narrowly. Discrimination can be and often is "based on wealth" as long as the discrimination does not touch upon valuable and important rights. While a prisoner without funds may not be denied an appeal, it has not yet been suggested that equal protection requires that the authorities provide him with cigarettes or a free subscription to Time Magazine. While indigent children are generally considered to be entitled to adequate medication and adequate schooling, no one has yet to establish that they are entitled to free television in the home or free Cokes and candy bars. As long as we maintain a free economy and a democratic society, there will be innumerable deprivals "based on wealth" and all but the most affluent will from time to time be excluded from numerous desired pleasures and activities "based on wealth."

The *Griffin* line of cases was relied on to emphasize the valuable and important nature of appeal in *North Carolina v. Pearce*, 395 U.S. 711 (1969), a case having no indigency aspects whatever. Appeal has been held of sufficient importance for constitutional protection in *Lindsey v. Normet*, 405 U.S. 56 (1972), again relying upon the *Griffin* decisions. Please notice that *Lindsey* is not an indigent rights decision. The Court struck down the double bond requirement for everyone, even Nelson Rockefeller, regardless of ability to pay. While the double bond was particularly onerous upon the impoverished, the Court did not limit its decision to the poor, holding that "the nonindigent FED appellant * * * is confronted by a substantial barrier to appeal faced by no other civil litigant * * *," *Id.* 79.

The Ninth Circuit further thought that the California courts might have a special interest in holding in terrorem those who might be tempted to trifle the Court, but any such objective is neither necessary nor legitimate and furthermore, it is overinclusive.

The common law notion that punishment for contempt should be the personal prerogative of the judge because the act was a personal affront to him has long since been rejected by our democratic society. The idea that there is any necessity for the denial of appeals in criminal contempt is rejected by the long-standing rule in the federal court and in a majority of American jurisdictions, all of whom have progressively thrown off the common law tradition of personal prerogative to the judge.

North Carolina v. Pearce, supra, firmly established that the " 'right of appeal must be free and unfettered,' " *Id.* 17. The usual argument for peremptory procedures in contempt including denial of appeal is the need to suppress courtroom disruption, but there was no disruption in this case, and no need for drumhead justice. This is certainly true with respect to the 3-day conviction for contempt before Judge Walker which was tried upon notice over a year after the alleged offense. Nor do we think that in terrorem was proper with respect to the refusal to testify because there was no urgency to obtain the information sought.[34]

[34]For this offense, petitioner was assessed both civil and criminal contempt. It is held in many jurisdictions including the federal that bail in civil contempt pending appeal is discretionary to the trial court but is a matter of right in criminal contempt. Likewise, in civil contempt, the right of appeal is neither immediate nor plenary. We only are presently concerned with the right to appeal the conviction of criminal contempt. Petitioner argues that he was being subjected to collateral impeachment which is not permissible under state law (J.A. 185, R. 1476-88). The Texas Court of Criminal Appeals refused to review this contention upon habeas. Before serving a term of imprisonment for criminal contempt, was petitioner not entitled to a review of this aspect of his case?

The Texas scheme denying appeal in all contempts whether or not there is any need or justification for peremptory procedures, is fatally overinclusive.

The Ninth Circuit decision in *Bell* cannot be reconciled with the Third Circuit decision of *In re Brown*, supra. The Third Circuit relied upon the *Griffin* line and did not consider those cases to be restricted to indigency situations. The Third Circuit opined that informality and flexibility of juvenile proceedings made appeal *more* desirable rather than *less*. The same observation applies to contempt. Further, the subject matter of contempt is one respecting which trial judges are often prone to lack a completely detached viewpoint; all making the right of appeal *more* desirable rather than *less*.

The various indigent appeal decisions cited above are here applicable to illustrate the fundamental nature of appeal in the context of criminal procedure. Avenues of appeal must be kept free of unreasoned distinctions even for convictions of "a city ordinance," quasi-criminal in nature (*Williams v. Okla. City*, supra) and ordinance violations subject to fine alone (*Mayer v. Chicago*, supra).

Bloom, supra, reaffirmed that contempt is a crime. *Dyke*, supra, required that the procedures of the criminal law apply even where very modest penalties are involved. *Griffin*, supra, declared the fundamental nature of appeal and forbade unreasoned distinctions limiting that right. *Williams*, supra, and *Mayer*, supra, extended the *Griffin* rule to "quasi-criminal" ordinance violations. *Brown*, supra, held that the equal protection right of appeal applies to proceedings even though they are not considered strictly criminal. The only logical conclusion to be drawn from these cases is that a contempt defendant also has the equal

protection right of appeal as the district court concluded in *Bell v. Hongisto*, supra.

Texas Discriminates Against A Contempt Defendant By Permitting Review Only By Habeas Corpus, An Inadequate Remedy

Texas law is settled; there may be no direct appeals of contempt. *Ex parte Cardwell*, 416 S.W.2d 382 (Tex. Sup. 1967), *Wagner v. Warnasch*, 295 S.W.2d 890 (Tex. Sup. 1956), *Lamka v. Townes*, 465 S.W.2d 386 (Tex. Civ. App. 1971), *Gardner v. State*, 352 S.W.2d 129 (Tex. Crim. 1961), *Ex parte Aldridge*, 334 S.W.2d 161 (Tex. Crim. 1959) (cited in opinion below on a different point), *Starr County v. Laughlin*, 283 S.W.2d 830 (Tex. Civ. App. 1955). At the same time, the statutes quoted in petitioner's appendix (P.A.47-48) confirm that there is no other class of criminal defendant in Texas completely without the right of appeal. Also, misdemeanor defendants are entitled to bail as a matter of right pending appeal, *Tex. Code Crim. Proc., Art.* 44.04.

Regardless of the rule in California, habeas is not an adequate substitute under Texas law. The limitations and pitfalls of the remedy are outlined in Greenhill [present Ch. J., Tex. Sup. Ct.] & Beirne, *Habeas Corpus Proceedings*, 1 St. Mary's L.J. 1, 4 (1969). With specific regard to contempt, Texas courts have repeatedly held that habeas is a limited review. *Ex parte Fisher*, 206 S.W.2d 1000 (Tex. Sup. 1947), *Ex parte La Rocca*, 282 S.W.2d 700 (Tex. Sup. 1955), *Ex parte Cox*, 479 S.W.2d 110 (Tex. Civ. App. 1972), *Ex parte Smith*, 467 S.W.2d 411 (Tex. Crim. 1971), *Garcia v.*

Garcia, 469 S.W.2d 920 (Tex. Civ. App. 1971), *Ex parte Dean,* 517 S.W.2d 365 (Tex. Civ. App. 1974).[35]

We have already discussed the plight of client McKelva as shown in *Maness v. Meyers,* supra. Client McKelva was forced to wait in jail while his lawyers rushed two successive petitions for habeas to the Texas Supreme Court at Austin where they were both peremptorily denied within hours of their filing. See *Ex parte McKelva,* 16 Tex. Sup. Ct. J. 202 (1973). The Supreme Court notes that the federal district court ultimately "concluded that McKelva had asserted a valid Fifth Amendment privilege," but the Texas appellate court refused to even give the man a hearing. Petitioner cites client McKelva's case as related in the *Maness* decision as a specific example of how the denial of appeal denies equal protection.

Petitioner Has Standing To Challenge The Statute Because He Was Denied An Appeal

The wording of the opinion of the Court of Criminal Appeals raises a possible question as to petitioner's standing to challenge the statute inasmuch as the opinion commences "this is an appeal" and concludes "the judgments are af-

[35]The denial of bail is similar. While trial courts are under a statutory duty to admit conventional criminal defendants to bail pending appeal in all cases excepting the most serious felonies, the contempt defendant must secure his bail, if at all, from the appellate court. In most instances this will require the services of an attorney to travel to the state capital over 200 miles from the major population centers, at considerable additional expense to the defendant, who must languish in jail while the process is being completed. **Greenhill & Beirne,** supra, at 5-6. Appellant was forced to remain in jail until counsel traveled to and from the state capitol and obtained an order fixing bail from the appellate court (J.A. 165, 157). For the vast group in the marginal area, neither affluent nor indigent, the Texas procedures will inhibit if not preclude them from bail which they otherwise could have made.

firmed." This and other language in the opinion constituted, at most, inadvertent use of inappropriate terminology.[36] Offhand description of a habeas petition as an appeal did not alter established law. *Madearis v. Madearis*, 487 S.W.2d 198 (Tex. Civ. App. 1972) repeated the rule of non-appealability within two weeks of the decision in petitioner's case and in the subsequent case of *Arnold v. State*, 493 S.W.2d 801 (Tex. Crim. 1973) the long standing rule that "there is no right to an appeal from an order of contempt" was re-affirmed.

A glance at the record establishes that petitioner's case in the Court of Criminal Appeals was styled and prosecuted as a habeas corpus. Petitioner based a constitutional challenge on the denial of appeal (J.A. 189, R. 1121-22, 1494-95) and the Court replied "We have concluded that the statute is not subject to the attacks [notice the plural] of unconstitutionality leveled against it." (J.A. 207). In spite of misleading language, the Court of Criminal Appeals held in petitioner's case, as it has held throughout, that there may be no appeal in contempt. The matter was clarified in *Ex parte Waters*, 499 S.W.2d 309 (Tex. Crim. 1973) where the Court stated:

> "In *Howell* the opinion states that the case involves an appeal * * * this was in error as the action involved an original application for habeas corpus."

Petitioner may not be deprived of standing to challenge

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[36]The district court decision in **Bell v. Hongisto** first appeared in the November 6, 1972 edition of the Federal Supplement, nine days prior to the decision in hand. Whether that decision prompted any last minute editing of the criminal appeals opinion in an effort to avert a constitutional challenge, one can only speculate. It is entirely possible that Texas Criminal Appeals was unaware of the district court decision in **Bell** when it delivered its decision. Certainly, the court of Criminal Appeals did not overrule long standing precedent that there is no right of appeal in a contempt case.

the statute simply by labeling as an appeal that which is plainly and incontrovertibly a habeas corpus and at the same time covertly overruling his proposition that the statute is infirm for failure to provide the right of appeal. The statute is bad for failure to provide the equal protection right of appeal and petitioner has been denied the right of appeal.

(6) *FOR FAILURE TO WARN, THE STATUTE IS VOID FOR VAGUENESS*

(7) *FOR OVERBREADTH THAT STIFLES THE FIRST AMENDMENT RIGHT OF PETITION, THE STATUTE IS UNCONSTITUTIONAL*

This discussion contains important additional authority plus a condensation of the argument and authorities on pages 102-126 of the jurisdictional statement (J.A. 228-230, R. 1497-1521).

In petitioner's case, the Court of Criminal Appeals redefined contempt to encompass that which the Court decided by conclusion to be "fraudulent" and by equivalent conclusion to be "professional misconduct." The crime, if such it be, was â strange one. A man known and recognized in the community possessing all indicia of respectability, committed this crime during ordinary business hours in front of witnesses well acquainted with him. He insisted that a record be made of his crime (J.A. 53-54). Thereafter he did not flee but returned freely and just as freely admitted performing the act but steadfastly refused to surrender the fruits of the crime. The complainant did not denounce the offender for many months until after the criminal had accused complainant himself of highly questionable acts. We ask: Is it not possible that the criminal did not comprehend his acts as such? Was he possibly deluded into think-

ing that he was serving a legitimate interest? Possibly, the interest of someone whom he had obligated himself to serve?

"Murder", "rape" and "robbery" have a precise and commonly understood definition but not so, "contempt of court." *Ex parte Norton,* 191 S.W.2d 713 (Tex. Sup. 1964) has incorporated the following definition into the statute: "[1] Generally speaking, [2] he whose conduct tends to bring the authority and administration of the law into disrespect [3] or disregard, [4] interferes with [5] or prejudices parties [6] or their witnesses during a litigation, [7] or otherwise tends to impede, [8] embarrass, [9] or obstruct the court in discharge of its duties *is guilty of contempt."* Thus we have a statutory definition of the crime commencing in the first two words with an ambiguity and succeeded by seven disjunctives. Of what help is this? Further, the Court of Criminal Appeals, without the slightest discussion of principles or citation of authority has expanded the definition to cover "fraudulent action" and "professional misconduct." What are the limitations to this crime?

Petitioner's Conduct In Taking A Default Had Never Previously Been Prohibited

When terms are difficult to define, resort is often had to examples. Is it possible to take the specific conduct shown by the various Texas cases and say "This and all similar conduct is prohibited by the Texas Criminal Contempt Statute?" NO!!! The Court of Criminal Appeals rejected any such approach, disregarded all precedent in the State of Texas and opened new vistas of criminal conduct on a retrospective case by case basis.

In Texas, divorce is like any other case; when there is a default, plaintiff is entitled to judgment. And if the proceedings are regular, the judge is obliged to enter it. Certainly, the attorney for the plaintiff is entitled to secure a divorce by default, for what layman can secure his own rights at the bar? The Texas reports are stuffed with defaults. In practically every one of those reported decisions the default was the result of simple dereliction (why else would the defendant later carry the default to an appellate court?) and, let's not fool ourselves, in most instances, the plaintiff and his attorney knew as much. Nevertheless, we are unable to find a single case holding either attorney or client in contempt for taking a default in a divorce or any other case. We have made this statement numerously without challenge. At least insofar as Texas law is concerned, this contempt represents a totally new and unheard of proposition of contempt law. Petitioner argued in the Texas Courts that Texas law permits the taking of defaults even when one has reason to know that his opponent wishes to defend, that lawyers are expected to represent their clients, to preserve the confidence of the clients and for such reason they cannot tell all they know about the case even to the judge. They are not some type of surrogate or special master, but are the representatives of the litigants appearing for the purpose of securing the client's rights.

Cleveland v. Ward, 285 S.W. 1063, 1071 (Tex. Sup. 1926) holds that the pendency of another suit must be seasonably pleaded in abatement and without such, a default will be sustained. See also *Phillips v. Phillips,* 223 S.W. 243 (Tex. Civ. App. 1920), *Sneed v. Sneed,* 296 S.W. 643 (Tex. Civ. App. 1927), *Blassingame v. Cattlemen's Trust Co.,* 174 S.W. 900 (Tex. Civ. App. 1915), *Cattlemen's Trust Co. v. Blassingame,* 184 S.W. 574 (Tex. Civ. App. 1915).

Fusari v. Steinberg, 419 U.S. 379 (1975), cited below, is illustrative. The Chief Justice rightfully lectured the parties for "neglect" to disclose certain matters. However, may we emphasize that the Supreme Court *neither disbarred nor put those lawyers in jail.* Like the case in hand, we know of no specific and intelligible rule or practice that the lawyers in *Fusari* violated. We know why those lawyers did not make the disclosures for which they were taken to task. It was because they felt that the best interests of their clients would be served by striving for and securing a decision of the Supreme Court. To punish those lawyers would have constituted punishment for ordinary mistakes, for the lack of good judgment and for the exercise of excessive zeal on behalf of their clients. This, we submit, cannot be done. In order to punish, courts must spell out in advance what must be disclosed because *it is contrary to our entire scheme of advocacy and to the rules under which lawyers have been trained and schooled for generations to imprison for the failure to sufficiently effect voluntary disclosure.*

The case in bar is no different. Mistakes, errors, oversights, omissions and errors of judgment warrant prompt and stern lectures from the bench. They sometimes warrant the setting aside or reversal of a judgment previously granted and the record shows that Judge Walker set aside the default judgment awarded to petitioner's client, Mrs. Ralston. However, to go further than this and to impose punishment for vaguely defined breaches of duty, without a showing of affirmative and wilful misconduct, is destructive of our entire system of advocacy.

Petitioner followed the classic method of taking a default; bringing the client before the bar and tracking through the petition asking the client to verify the allegation. Usually the Court thereafter asks a few questions and

it appears that such was done here. But inquiries relating to the defendant's failure to appear and such, all bear on the question of defendant's diligence which is his burden of proof under Texas law if he wishes the default set aside. *Lickman v. Lickman,* 368 S.W.2d 51 (Tex. Civ. App. 1963, dism.) Petitioner urged to the state courts that the plea of autre action pendant is strictly defensive and waived unless seasonably presented. See also *Baylor v. Baylor,* 4 S.W.2d 209 (Tex. Civ. App. 1928).

The "Declaration and Certificate" recites "an obligation of candor" which allegedly "was not discharged" and that the same "is wilful, fraudulent and contemptuous" (J.A. 24-25). But there is no authority anywhere in Texas; no statute, no rule, no decision. Petitioner received no warning from the Texas law that his conduct was in fact, forbidden, much less criminal. It is true that the Texas Bar, *Canons of Ethics,* Tex. Civ. Stats. Vol. 1A, p. 236 then in effect called upon a lawyer to exercise "candor and fairness" but this amounts to a definition of an ambiguity with a nebulosity. Further, that duty is "before the Court and with other members [of the Bar]." The Canon only requires a lawyer to disclose to the Judge that which he is obliged to disclose to his opponent. And what does the judge do with confidential information in view of the strong common law tradition against secret evidence? If a lawyer is obliged to tell all to the judge, then the judge is obliged to relay the information to the other side. This contempt prosecution strikes at our entire system of jurisprudence. The conduct of lawyers and all other human beings moves between two poles. On one hand is the altruistic or highest level and on the other hand is the intolerable level. Ethical codes are rightfully oriented toward the altruistic level but criminal contempt is concerned only with the intolerable. For such reason, ethical

principles and declarations have little or no application in a contempt proceedings. People cannot be sent to jail for lack of altruism. Neither do we think that lawyers can be sent to jail for failing to conform with the *Canons of Ethics*. Beyond the slightest doubt Texas law has never so provided, not until this case.

Petitioner violated no order, rule or statute. He was convicted of "fraudulent action" and "professional misconduct." Compare the case of *In re Callon,* 331 A.2d 612 (N.J. Supreme, 1975) where the attorneys were convicted of "fraudulent and deceitful conduct" for "remaining silent" after learning that their clients were distributing a fund which the court had ordered to be frozen

> "* * * [Concerning] the matter of appellants' silence, however poor their judgment in the course of conduct they followed, it did not constitute a contempt of court. They violated no order of the court.
>
> * * * * * * * * *
>
> "We conclude, * * * that they used extremely poor judgment in the circumstances, even though we find their conduct to be not contemptuous."

Three of the seven judges quoted Mr. Justice Jackson, " 'A common law trial is and always should be an adversary proceeding' " and urged that "the conduct of appellants was not improper."

The case in bar is stronger from the standpoint that *Callon* involves unmistakably contemptuous acts. The only question was "Can the attorneys be held responsible?" On the other hand, petitioner was not protecting the confidence of a client. However, the point as we see it is that the duty of disclosure runs opposite to the duty to act as an adver-

sary. Preservation of the adversary system requires that no lawyer may be sent to jail for violation of a duty to disclosure unless that duty has been clearly spelled out.

Petitioner, like the attorneys in *Callon* was operating in an area where he was forced to exercise his own judgment because no rules or orders had spelled out any duty to disclose. Was the judgment of this petitioner any better or any worse? The answer to this question could be the subject of extended debate. But this petitioner was undoubtedly convicted of the identical offense; the exercise of questionable judgment in the course of representation of a client. As emphasized by the minority opinion in *Callon*, punishment for mistakes in judgment is subversive of the adversary system of trial.

Some may think that petitioner should have been more frank with the judge; others would argue the law to be adversary and that it was not improper to avoid the questions. A lawyer is an advocate, not a surrogate. Some might argue that domestic relations cases are charged with such special connotations that they should not be subject to ordinary rules of adversary practice. Others would strongly reply that whatever the law should be, this is not the law in Texas. *However, the difference of opinion proves our case.* Where laws are so vague and the situation such that reasonable and intelligent men might differ as to whether or not the particular conduct is proscribed, it may not be punished as criminal. Past conduct may not be made the subject of imprisonment by labeling it "fraudulent action" and "professional misconduct." Interpretations of a statute become a part of the statute. The Due Process Clause and the prohibition against ex post facto laws, *Article I, Section* 10, U. S. Constitution, forbids criminal sanctions unless the conduct was clearly prohibited by a statute in force before

the infraction occurred. By continually redefining an amorphous statute, the Texas Court continues to retrospectively create new crimes. Such is wholly impermissible. *Bouie v. Columbia,* 378 U.S. 347 (1964). *Douglas v. Buder,* 412 U.S. 430 (1973).

Zealous Advocacy Is Protected By The First Amendment Right of Petition

A lawyer's entire raison d'etre is not to serve the judge but to serve his client. Because we hold our adversary system dear, we cannot reward every step slightly over the line with jailhouse bars. The Due Process Clause and the *First Amendment* prohibit it. In *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963) it was recognized that the right of petition included the right to counsel and that a state may not impose undue restrictions on that right, not even "to insure high professional standards." See also *Brotherhood v. Va. Bar,* 377 U.S. 1 (1964) and *United Mine Wkrs. v. Ill. Bar,* 389 U.S. 217 (1967). In *Holt v. Va.*, supra, it was held that the contempt power may not be invoked in a manner which infringes upon the Sixth Amendment right to counsel.

The right of petition is the property of the client, but just as the attorney-client privilege, the lawyer has the right if not the duty to invoke it for the protection of the client. A vigorous independent bar is indispensible to our system of justice. *In re McConnell,* 370 U.S. 230, 236 (1961).

First Amendment Rights Must Be Free From The Chilling Effect of Sweeping and Overbroad Statutes

The Texas Criminal Contempt Statute is fully as broad as that one stricken down in *Musser v. Utah,* 333 U.S. 95 (1948), a statute broad enough to warrant conviction for "almost any act a judge * * * might find at the moment

contrary to his * * * notions of what was good for health, morals, trade, commerce, justice or order." "Vague and indefinite statutes are particularly obnoxious" when they infringe upon First Amendment rights. *Winters v. N.Y.*, 333 U.S. 507 (1946). "A crime must be expressed clearly enough that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue!" *Connally v. General Const. Co.*, 269 U.S. 385, 393 (1926). The right of speech and the right of petition are both protected by the First Amendment. Stricter standards of permissible vagueness will be applied where the First Amendment is involved. *Cramp v. Bd. of Pub. Instr.*, 368 U.S. 278 (1962).

Leading recent cases striking down statutes that infringe upon the First Amendment are *University Committee v. Gunn*, 289 F. Supp. 469 (3 Judge, W.D. Tex. 1968) dism. 399 U.S. 383 (1970), *Cohen v. Calif.*, 403 U.S. 15 (1971) and *Coates v. Cincinnati*, 402 U.S. 611 (1971). See *Gooding v. Wilson*, 405 U.S. 520 (1972) where it was held that the cases construing the statute contributed to its vagueness, an observation here very appropriate. See also *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) and *Palmer v. Euclid*, 402 U.S. 544 (1971). The Supreme Court has been particularly concerned with vagueness and overbreadth recently. We would particularly point out *Smith v. Goguen*, 415 U.S. 566 (1974) providing for punishment of anyone who "treats contemptuously" the flag. The parallel to "contempt of court" is tremendous.

> "The due process doctrine of vagueness * * * incorporates notions of fair notice or warning. Moreover it requires legislatures to set reasonably clear guidelines for * * * triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' Where a statute's literal scope, unaided by a narrowing state court interpreta-

tion, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

* * * * * * * * *

"Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predelictions. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Id.* 4395-96.

"[The state's 'hard-core' violator theory is rejected.] This criminal provision is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' * * * Such a provision simply has *no* core." *Id.* 4397.

Parker v. Levy, 417 U.S. 732 (1974) is favorable to petitioner even though the Court refused to sustain vagueness and overbreadth claims against the Uniform Code of Military Justice. The Court first emphasized the strong need of the military service for discipline and unswerving obedience; the same legal standards cannot be and never have been applied to soldiers as to civilians. It found that the Code provisions under attack had been limited in their scope by a long line of decisions making them applicable in certain specific situations and that defendant's conduct was specifically proscribed by regulations under the Code. The Court held that in view of the peculiar nature of military service, it would uphold the defendant's conviction because it was so grossly and palpably contrary to good order that no reasonable man would have considered it to be acceptable. No one has ever suggested that courts may place

lawyers under military discipline but even under the test applied in *Parker,* petitioner is entitled to relief. Rather than confine the sweep of the Texas Criminal Contempt Statute, the Court has broadened it. There is no regulation or decision proscribing the particular conduct for which petitioner has been cast or any similar conduct. The conduct shown is at most borderline, neither gross nor palpable, certainly not of the kind that any reasonable person similarly situated would instinctively know to be wrongful.

A Lawyer Acting In Good Faith May Not Be Punished For An Error In Judgment

In *Maness v. Meyers,* supra, an attorney was fined and jailed because he advised his client that the client was possessed of a Fifth Amendment right to defy a court order requiring the client to comply with a subpoena duces tecum for certain magazines:

> " 'If an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, *he cannot be held liable for error in judgment.* The preservation of the independence of the Bar is too vital to the due administration of justice to allow the application of any other general rule.' " *Id.*

The following A.B.A standard was quoted with approval:

> " 'A Lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interests are qualities without which one cannot perform fully as an advocate.' " (fn. 16)

This petitioner did not give advice to his client and cause his client to act thereon as in *Maness.* Instead, he

formed an opinion and acted on it himself. In essence he was advising himself. He was using his opinion or knowledge of the law to guide his actions on behalf of the client. We see no distinction. Petitioner must go free unless he acted — "with a lack of good faith or reasonable grounds" or acted "in bad faith or patently frivolous" (insupportable) manner. The terms are used interchangeably.

This petitioner demonstrated his good faith opinion as to the lawfulness of his conduct by his steadfast refusal to set aside the default judgment (J.A. 61, 62). For months, he engaged in the same type of confrontation with Judge Walker as attorney *Maness* engaged in with Judge Clawson, the initial trial judge in that case. Petitioner is being punished for his attempts to stand up for his client's rights as he saw them.[37]

Whether the command is issued verbally from the bench or in a written order or whether it is contained in court rules or statute or elsewhere, we respectfully submit that it makes no difference. A lawyer has a function to fulfill and a qualified privilege from punishment as long as he is arguably striving to fulfill that function. He must in every case be specifically apprised as to exactly what is expected of him. Punishment may not be inflicted without notice or warning unless the conduct is palpably or flagrantly wrongful. Otherwise, a lawyer is exposed to the very real danger of punishment for errors in judgment and advocacy repressed thereby. In such cases, a contempt conviction "constitutes an arbitrary interference with the constitutionally protected attorney-client relationship," *Maness v. Meyers*, supra, (Con. Op.).

[37]Admittedly, Judge Walker did not even discuss holding petitioner in contempt until many months later after petitioner brought out Judge Walker's rather unusual conduct in altering court papers. Petitioner's claim is that the contempt action is a retaliatory proceedings.

Zealous Advocacy Must Be Protected From Vague and Erratic Application of The Contempt Power

Never before has Texas assessed a contempt conviction for "fraudulent action" or "professional misconduct." Is it not rather absurd to assume that no conduct has ever before occurred in or about a Texas courtroom which could be fitted within the rather ample confines of those terms? The only logical explanation is that it has never been previously considered that such are grounds for a contempt conviction. "Fraudulent" is one of the broadest terms in the language. See *Yamini v. Gentle,* 488 S.W.2d 839 (Tex. Civ. App. 1972) where the tax collector convinced the trial court that it was fraudulent to fail to declare for taxation a building visible two blocks away. "Professional misconduct" is equally elusive of definition. May a lawyer be "laid by the heels" for improper action when it took the highest state court "to make it so." *Fisher v. Pace,* 336 U.S. 155 (1945) (Dissent). By statute or rule, Texas may prescribe what a lawyer must disclose in order to obtain a default, may thereby remove the vagueness and overbreadth element from the case and may punish for violation of intelligible rules. The danger to advocacy from the overuse of contempt has often been noted. *U.S. v. Oliver,* 470 F.2d 10 (7-Ill. 1972), *Phelan v. Guam,* 394 F.2d 293 (9-Guam 1963) and *U.S. v. Sopher,* 347 F.2d 415 (7-Ill. 1965), *In re Hallinan,* 459 P.2d 255 (Cal. Sup. 1969), *In re Green,* 369 U.S. 689 (1962), *Matter of Rotwein,* 51 N.E.2d 669 (N.Y. App. 1943), *Gallagher v. Municipal Court,* 192 P.2d 905 (Cal. Sup. 1948), *Cooper v. Superior Court,* 359 P.2d 274 (Cal. Sup. 1961). For texts on the subject see *Notes: Contempt-Conduct of Attorney,* 1971 Wisc. L. Rev. 329, 343 (1971); Harper & Haber, *Lawyer Troubles in Political Trials,* 60 Yale L.J.1 16-25 (1951);

Notes: *How Far May An Attorney Go For His Client*, 35 So. Cal. L. Rev. 104 (1961) and Comment: *Controlling Lawyers by Bar Associations and Courts*, Harv. Civ. Rts. L. Rev. 301, 379 (1970).

In *Matter of Dellinger*, 461 F.2d 389, 400 (7-Ill. 1972), it was stated that attorneys must be given great latitude in the area of vigorous advocacy and that an attorney only possesses the requisite intent necessary to be found guilty of contempt if beyond a reasonable doubt, any person so situated would know that he is exceeding *the outermost limits of advocacy*. Clearly, petitioner's misconduct, if it be such, falls far short of that standard.

Another case in point is *U.S. v. Meyer*, 346 F. Supp. 973 (D.C. D.C. 1972), where it was held that an attorney may not be sent to jail upon a charge that he violated "certain ABA canons and * * * [failed] to fulfill * * * [his] obligation as an officer of this Court." While the court declared that the respondent's conduct was far from exemplary, the court decided that he was acting within "the wide latitude a lawyer has under Holt v. Virginia" and returned a finding of "not guilty."

Finally, we would point to a quotation in a recent issue of the American Bar News stating that it is everyone's duty to preserve our system of government under law, but it is a lawyer's highest duty to secure the rights of his client.

> "Lawyers too concerned with looking over their should at what some self-appointed guardian of legal morals may say about them will soon lose the courage and strength of a vigorous bar, which the Supreme Court has many times reminded us, is an indispensable part of our system of justice." 18 *American Bar News*, No. 11, p. 9 (Nov. 1973).

The courts of Texas may set reasonable and specific standards of conduct and they may enforce them. But, lacking any standards, lacking any prior warning, a lawyer seeking to secure the interest of his client may not be fined and imprisoned for violation of a vague statute. The First Amendment right of petition forbids it. If such were allowed, the immediate losers would be the lawyer and the Bar. But the greatest loss would be to the interests of society in preserving free recourse to the courts and zealous advocacy.

Conclusion

For the reasons given, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

NO. 75 ——

CHARLES BEN HOWELL ..... *Petitioner*

v.

CLARENCE JONES, SHERIFF,
DALLAS COUNTY, TEXAS ..... *Respondent*

PETITIONER'S APPENDIX

Proceedings In State Trial Courts

DOMESTIC RELATIONS COURT 2, DALLAS COUNTY, TEXAS; MARRIAGE OF NORMAN & EDNA RALSTON; NO. 71-8259-DR/2

DECLARATION AND CERTIFICATE OF CONTEMPT OF COURT OF CHARLES BEN HOWELL UNDER THE PROVISIONS OF ARTICLES 1911 AND 1911A, TEXAS CIVIL STATUTES

[filed June 28, 1972]

BE IT REMEMBERED that heretofore on May 26, 1971, Charles Ben Howell, a Texas attorney, appeared before the

Judge of the 162nd District Court of Texas at Dallas, Texas, with his client Edna Dell Morgan Ralston and with the papers and court file in cause 71-3096-DR/2 pending in the Domestic Relations Court Number Two of Dallas County, Texas and requested the Court to hear a divorce case in which the Defendant had defaulted in appearance and answer in said cause 71-3096-DR/2.

Be it further remembered that the Court heard said cause upon presentation by Charles Ben Howell for Plaintiff when no answer in said cause has been filed by the named and duly cited Defendant and a transcript of the proceedings was made as shown by the attached statement of facts transcribed of said hearing attached as part hereof.

Be it further remembered that prior to May 26, 1971, it was well known to Charles Ben Howell that:

(1) there was pending in Domestic Relations Court Number Two, Dallas County, Texas, cause 71-3096-DR/2 styled Norman Clark Ralston v. Edna Dell Morgan Ralston, which cause was not disposed of on or prior to May 26, 1971 and in which Jerry Coplin was attorney for Petitioner and Charles Ben Howell was attorney for Respondent by filings and appearances therein;

(2) there was pending in Domestic Relations Court Number Three, Dallas County, Texas, cause 70-9863-DR/3 styled Edna Dell Ralston v. Norman Clark Ralston in which no answer had been filed by Respondent;

(3) that prior to May 26, 1971 the Domestic Relations Court Number Two had caused cause 71-3096-DR/2 to be handled by Domestic Relations Court Number Three and papers listing both causes in the same instrument

had been filed and appearance made by Jerry Coplin for Norman Clark Ralston and by Charles Ben Howell for Edna Dell Ralston in both causes in Domestic Relations Court Number Three;

(4) that on May 26, 1971 the facts of the coupling of said causes 70-9863-DR/3 and 71-3096-DR/2 for hearing in Domestic Relations Court Number Three and the representation of and appearance for Norman Clark Ralston by Jerry Coplin, a Texas attorney, in either or both of said causes and the pendency of cause 71-3096-DR/2 was unknown to the Judge of the 162nd District Court;

(5) that at a hearing of cause 70-9863-DR/3 in the 162nd District Court no record or fact of the pendency of cause 70-9863-DR/3 or the activities in either or both Ralston pending causes was disclosed in the attached transcription of proceeding and statement of fact taken at the hearing of cause 71-3096-DR/2 in the 162nd District Court on May 26, 1971;

(6) that more than 30 days passed before notice of judgment entry in cause 71-3096-DR/2 was communicated to Jerry Coplin and cause 70-3096-DR/2 continued to pend;

(7) that subsequent to May 26, 1971 the 162nd District Court Judge learned from the parties and the records in said causes 70-9863-DR/3 and 71-3096-DR/2 that (a) on May 24, 1971 the parties Ralston and their attorneys, Jerry Coplin and Charles Ben Howell, appeared before Domestic Relations Court Number Three regarding setting of trial in July, 1971 and to appear again on June 2, 1971 regarding custody and visitation of minor children and (b) on June 2, 1971 the parties and at-

torneys did so appear without disclosure of the proceedings in the 162nd District Court on May 26, 1971 awarding custody of the minor children to Mrs. Ralston by its effect different from award of custody to Dr. Ralston by the Domestic Relations Court Number Three and granting other relief to Mrs. Ralston as a final judgment.

This Court finds that on the occasion of May 26, 1971 Charles Ben Howell as an officer of the court and attorney owed an obligation of candor and disclosure of the whole facts of said causes 70-9863-DR/3 and 71-3096-DR/2 which was not discharged as shown by the attached transcription of proceedings and the answers of Charles Ben Howell to the inquiry of the Court on such occasion and the presentation of only part of the facts of the pending cases affecting the rights of the parties by his then presentation to the Court on May 26, 1971 was a deliberate concealment of relevant facts reasonably calculated to accomplish to him and his client a beneficial result to them in concealment and nondisclosure of relevant facts when a duty of an attorney required disclosure in candor and the actions of Charles Ben Howell and his presentations to and concealments from this Court was and is wilful fraudulent and contemptuous of the Court and derelict of his duty as an attorney amounting to extrinsic fraud on the Court.

This Court has found and declared on March 3, 1972 and finds Charles Ben Howell, a Texas attorney and officer of this Court and acting as such in cause 71-3096-DR/2, to be guilty of contempt of court under the authority of Article 1911, Texas Civil Statutes then in effect on May 26, 1971. The Court finds that since May 26, 1971 Article 1911(a) has become effective and that within the limits of punishment existing May 26, 1971 of a fine of not more than $100.00

and/or imprisonment in the county jail of three full days not to exceed 72 hours, Charles Ben Howell is entitled to a hearing on such contempt and determination of proper punishment thereof by a Judge other than this Judge on this Court's finding of a contempt of court by Charles Ben Howell on May 26, 1971 as hereinbefore set out.

[NOTE: Here omitting charges which Judge Holland did not sustain, see R. 977, 1031]

The Court finds that Charles Ben Howell is in contempt of Court and is entitled to have a Judge other than the undersigned Judge and this Court finds that upon each and both findings of each and both findings of contempt against Charles Ben Howell, an officer of this Court and a Texas attorney, shall have and is entitled to a hearing on such contempts and punishment provided by law therefor before another Judge assigned by the presiding Judge of this Administrative Judicial District and to this end this Court and the undersigned Judge thereof makes these findings of contempt and assign them to the presiding Judge of this 1st Administrative District of Texas, Judge Dallas A. Blankenship for certification and assignment to another proper judicial officer under Article 1911(a) for trial and determination of punishment of Charles Ben Howell herein found and charged with contempt and for further procedure and action as provided by law.

Signed this 15 day of June, 1972.

/s/ Dee Brown Walker
JUDGE

Judge 162 Judicial District Court
Sitting for Judge Domestic Relations
Court No. 2 of Dallas County, Texas.

[Exhibit Attached to Foregoing "Declaration and Certificate of Contempt" Identified as Stenographer's Transcript of Proceedings Before Honorable Dee Brown Walker on May 26, 1971; Formal Parts Omitted]

162ND DISTRICT COURT, DALLAS COUNTY, TEXAS; MARRIAGE OF NORMAN & EDNA RALSTON; NO. 71-3096-DR/2

APPEARANCES: MR. CHARLES BEN HOWELL, Attorney at Law, Dallas, Texas for Edna Dell Morgan Ralston

[TESTIMONY OF] EDNA DELL MORGAN RALSTON

Direct Examination By Mr. Howell

Q. You are Mrs. Edna Dell Morgan Ralston? A. Yes, sir.

Q. And you are the Petitioner in this case? A. Yes.

Q. And your husband is Norman Clark Ralston? A. Yes.

Q. And he filed divorce suits against you about four times all told, I believe you told me, is that right? A. Yes.

Q. And back in 1968, he actually got a divorce? A. Yes.

Q. And then you all got married again, is that right? A. Yes.

Q. Now, you have asked for a Bill of Review as to your 1968 divorce? A. Yes.

Q. And you are asking for a divorce now, is that right? A. Yes.

Q. And this is the first time you have ever filed suit for divorce? A. Yes.

Q. All right, now — * * * * *

THE COURT: Well, let's see? It shows her, him to be the Plaintiff. Well, you filed a Bill of Review? This is '71 here? MR. HOWELL: Yes, Judge.

THE COURT: She filed this one here? MR. HOWELL: No, she filed this one here. That's just the way they are styling those cases now —

THE COURT: Regardless? MR. HOWELL: That's correct.

THE COURT: She is actually the Plaintiff? MR. HOWELL: That's right, and service was on him, yes.

(Proceedings off the record, after which time the following proceedings were had)

MR. HOWELL: Perhaps I filed it incorrectly. THE COURT: All right, she is the Plaintiff? MR. HOWELL: That's right.

Q. (by Mr. Howell) Now, in that 19 — He is a veterinarian, is that correct? A. (by the witness) Yes.

Q. All right, and in that 1968 divorce and prior to that, you were living with him? A. Yes.

Q. All right, and who kept all the books and records of the business, him or you? A. He did.

Q. And did he even let you see the income tax returns? A. No.

Q. And in 1968, how was your health at that time? A. It was very poorly.

Q. And as a matter of fact, while that divorce was pending, were you in the hospital? A. For a week, yes, sir.

Q. And under the care of a psychiatrist? A. Yes.

Q. And now, did you trust him to look after the property? A. Yes.

Q. And did you really know what property you folks owned at that time? A. No.

Q. And were you able to come to court and, in connection with that divorce? A. No.

Q. And is it true that he represented that the Grove Animal Clinic had little or no going business? A. Yes.

Q. And you have since found out that that's not true? A. Yes.

Q. And is it true that he represented that there were no accounts receivable of any value at the Grove Animal Clinic? A. Yes.

Q. And you have found out that that's not true? And is it true that he stated that he disclosed all of his assets and liabilities on documents, in documents on file with the Court? A. Yes.

Q. And did he represent that the values were fair and reasonable? A. Yes.

Q. And have you found out since that those statements were true or false? A. They were false.

Q. And after you got married again, I believe you told me about when he started partying and drinking a little bit and made some statements to you then and what did he tell you about that divorce settlement? A. Well, he bragged about selling a piece of property during the other divorce.

Q. All right. Did he ever say that "I sure snookered you and your lawyer"? A. Yes.

Q. All right, but up to the time of that divorce, you had left everything up to him in the managing of the property? A. Yes.

Q. Okay, and you had a meritorious cause of action at that time? A. Yes.

Q. And you relied on him to tell the truth about the property? A. Yes.

Q. And he didn't do it, is that right? A. Right.

Q. All right, and now —

THE COURT: Do you have that other file with you? MR. HOWELL: Which is this, Judge? Yes, I do. THE COURT: The '68. I will look at it. Where is this going to leave us here? MR. HOWELL: We are asking that it be restored as the status of community property and then divide, an undivided one-half to her. THE COURT: What are you going to do about dividing it up? MR. HOWELL: Well, we will negotiate division. We are just at this time asking for the Court to generally —

(The Court and Mr. Howell responding simultaneously and therefore, unable to be made a part of the record verbatim by the reporter)

THE COURT: What did you do, make a copy of the file? MR. HOWELL: That's right.

Q. (by Mr. Howell) And now, at this time, Mrs. Ralston let me ask you. Are you now an actual bona fide inhabitant of the State of Texas? A. (by the witness) Yes.

Q. Where have you lived for the last 12 months, in fact, all your life, what state? A. Texas.

Q. And have you been an actual bona fide resident of the County of Dallas? A. Yes.

Q. And you live in Dallas County now? A. Yes.

Q. All right, and has this marriage become insupportable? A. Yes.

Q. And do you have discord and conflict of personality? A. Yes.

Q. Do these conflicts of personality destroy the legitimate ends of the marital relationship? A. Yes.

Q. Is there any reasonable expectation of reconciliation? A. No.

Q. All right, and you have one daughter who is above 18 years of age? A. That's right.

Q. And you have two children that are below 18? A. Yes.

Q. And that is Cindy Renee, is how old? A. 13.

Q. And John Payton is how old? A. 9.

Q. And you are asking the Judge for the custody of those children? A. Yes.

Q. Now, Mrs. Ralston, you have obtained copies of his income tax returns since you have hired me to commence this lawsuit, is that right? A. Yes.

Q. And they show that he has an income from the, that he had an income in 1969 from the veterinary practice of around $28,000.00 net, is that right? A. Yes.

Q. And he also has had substantial income from investments, is that right? A. Yes.

Q. And do you feel that $500.00 a month, $250.00 a child would be a reasonable child support allowance? A. Yes, I do.

Q. All right, and you are able to care for and keep the children, aren't you? A. Yes.

Q. You have a good home? A. Yes.

THE COURT: Why haven't we heard from him on this thing; have you got any idea? He had a lawyer before. I wonder why he hasn't answered. Does anybody know? MR. HOWELL: Judge, I, I, uh, the record speaks for itself. THE COURT: What did you do with your part, what you got out of the community, what did you do with it? MR. HOWELL: Judge, the primary thing she got was a note which, after they were remarried, he took back.

Q. (by Mr. Howell) Is that right? A. (by the witness) Yes.

MR. HOWELL: She received it, it's a $36,000.00 installment — THE COURT: How much is he paying you now? MR. HOWELL: He has been sending her 200 a month and has increased it to 350.

Q. (by Mr. Howell) Is that right? A. (by the witness) Yes.

THE COURT: Well, I don't, I don't know. I think 500 is too much, Charles. MR. HOWELL: Well, quite well, Your Honor. THE COURT: He has been paying — Have you talked to him about this case pending here? MR. HOWELL: Have I?

THE COURT: Yes. MR. HOWELL: Yes, he has been served with papers. THE COURT: I know he has been served with papers, but have you heard from him? (by the witness) I haven't heard, no — THE COURT: Uh? A. (by the witness) I haven't heard.

THE COURT: When did you talk to him last?

Q. (by Mr. Howell) In person; have you talked to him recently in person? A. (by the witness) No. The only time I have even seen him was when he was in court. I saw him Monday afternoon. THE COURT: This last Monday? A. (by the witness) Yes. MR. HOWELL: They have been down here on temporary matters.

THE COURT: The 30th of March, it has been more than two months since you served him. What does he say about this? Did he have a lawyer then? MR. HOWELL: He has had a lawyer, yes, Judge. THE COURT: This time, did he have one when he was down there? MR. HOWELL: On the temporary hearing? THE COURT: Yes.

MR. HOWELL: He had a lawyer here with him. THE COURT: Who was his lawyer? MR. HOWELL: Gerald Coplin. THE COURT: I wonder why Gerry didn't file an answer. MR. HOWELL: That we don't know. THE COURT: Have you talked to Gerry about the case? MR. HOWELL: I have called Mr. Coplin's office several times and haven't gotten a response. THE COURT: But, you haven't ever received an answer from him, um? MR. HOWELL: No. THE COURT: There will be a Motion to Set This Aside. You say he is paying you 350 now? MR. HOWELL: That is correct. THE COURT: Well, I'll put 350 in here.

Q. (by Mr. Howell) And —

THE COURT: How much have you spent, how much time have you got in this up to now? MR. HOWELL: Oh, a pretty good amount of time, Judge. THE COURT: Have you got an agreement with her on a contingent basis or something? MR. HOWELL: Yes, we do have a contingent basis of 25 percent. I have accumulated a file of numerous papers and documents and checked the ownership of prop-

erty. There is around $200,000.00 worth of property, Judge, and —

THE COURT: She didn't get anything at all out of him before except this note, which she gave back to him? A. (by the witness) And the home.

THE COURT: Is the home clear of debt? A. (by the witness) No. He was to pay for six months, I mean, he was to make the payments on it for six months. If I didn't sell it after that, it was left up to me to make the payments, which I only got $300.00 a month, I couldn't have possibly done it. THE COURT: Did you lose the home? A. (by the witness) No, I still have it. MR. HOWELL: She's still living in it. THE COURT: I will put $500.00 in here and then you can work this other out with her. Are you going to make him pay it out of his part? I don't understand why Gerry hasn't filed an answer. Well, I imagine he will. He can file a motion. Okay. MR. HOWELL: Thank you, Judge. THE COURT: Here's this other file. MR. HOWELL: Okay.

(Close of proceedings as reported by reporter)

[J.A. 22-31]

JUDGMENT OF CONTEMPT

[Caption same as P.A. 1; filed July 27, 1972]

ON THIS the 27th day of July, 1972, came on for trial the above-styled and numbered cause; and the said CHARLES BEN HOWELL, a witness in the said cause, testified that he had requested four attorneys to represent him, all without avail; and the said CHARLES BEN HOWELL being asked upon cross-examination to name those four attorneys, refused to do so; and the Court having

ordered said CHARLES BEN HOWELL to answer the said question and reveal the said attorneys' names or to be found in contempt of court, continued to refuse to answer and does at this time refuse to answer the said question;

IT IS THEREFORE ORDERED AND ADJUDGED that the said CHARLES BEN HOWELL is in direct contempt of this court and the said CHARLES BEN HOWELL is hereby committed to the custody of the Sheriff of Dallas County to be confined in the Dallas County Jail until such time as he shall purge himself by revealing the names of the said four attorneys; and the Court further finds CHARLES BEN HOWELL in contempt of this court and sets his punishment at a fine of $500.00 and confinement in the County Jail for a period of thirty days.

/s/ Louis T. Holland
JUDGE

Judge *Retired Judge* Judicial District
Court Sitting For Judge Domestic Relations
Court *No.* 2 of Dallas County, Texas

[J.A. 142]

162ND DISTRICT COURT, DALLAS COUNTY, TEXAS; DEE BROWN WALKER VS. CHARLES BEN HOWELL; NO. 71-8259-DR/2

JUDGMENT OF CONTEMPT

[Filed July 28, 1972]

ON THIS the 27th day of July, 1972 came on for trial the above styled and numbered cause; and the Court having heard the evidence, finds that CHARLES BEN HOWELL is guilty of contempt of the Court committed on the 26th

day of May, 1971; the said CHARLES BEN HOWELL failed to make full disclosure as to all of the facts surrounding the matters before the Court after the Court had directly inquired of the said CHARLES BEN HOWELL, as to all of the said matters;

THEREFORE, IT IS ORDERED AND ADJUDGED that the said CHARLES BEN HOWELL is guilty of contempt of Court, and the Court sentences him to pay a fine of $100.00 and commitment in the County Jail for a period of three days, and the Court hereby commits the said CHARLES BEN HOWELL to the custody of the Sheriff of Dallas County, Texas, until the fine and the term of imprisonment have been satisfied.

/s/ Louis T. Holland
JUDGE

JUDGE *Retired* Sitting for Judge
Domestic Relations Court *No.* 2 of
Dallas County, Texas

[J.A. 143]

JUDGMENT OF CONTEMPT

[Caption same as P.A. 1; filed
July 28, 1972]

On this 27th day of July, 1972, came on for trial the above entitled and numbered cause wherein Charles Ben Howell has been found guilty of contempt of court by Dee Brown Walker, Judge of the 162nd Judicial District Court of Dallas County, Texas, sitting for the Judge of the Domestic Relations Court No. 2 of Dallas County, Texas, and the Court finds that the said Charles Ben Howell had requested

the Honorable Dallas A. Blankenship, Judge of the First Administrative Judicial District of Texas to assign another Judge to hear said contempt, which request was granted, and the said cause coming on for trial on the 27th day of July, 1972, before the Honorable Louis T. Holland, Retired District Judge, and this said Court having entered the following order:

[Here omitting quotation of judgment immediately preceding]

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Charles Ben Howell is guilty of contempt of Court, and the Court sentences him to pay a fine of $100.00 and commitment in the County Jail for a period of three days, and the Court hereby commits the said Charles Ben Howell to the custody of the Sheriff of Dallas County, Texas, until the fine and term of imprisonment have been satisfied, said contempt as herein adjudged, and as heretofore found by this Court and as heretofore found by Honorable Louis T. Holland sitting in this contempt under assignment by Honorable Dallas A. Blankenship, Judge of the First Administrative Judicial District of Texas, and said sentence of a fine of $100.00 and commitment to the County Jail for three days as found by Honorable Louis T. Holland as appropriate punishment for said contempt, is in all things confirmed and ordered by this Court for such contempt by said Charles Ben Howell of this Court.

/s/ Dee Brown Walker
JUDGE

Judge 162 Judicial District Court
Sitting for Judge Domestic Relations
Court No. 2 of Dallas County, Texas

[J.A. 144-145]

Proceedings In Texas Court of Criminal Appeals

COURT OF CRIMINAL APPEALS OF TEXAS; EX PARTE CHARLES BEN HOWELL; ORIGINAL APPLICATION; NO. 46,007

ORDER

[Filed July 31, 1972]

The application for writ of habeas corpus is set for hearing before the Court of Criminal Appeals on October 4, 1972, at the hour of 9:00 A.M. on the question of whether the writ should issue.

Bond in the sum of $100 dollars is set for the appearance of applicant and the Sheriff of Dallas County, Texas, will retain custody of applicant until such bond is given and approved or until the further order of the Court of Criminal Appeals.

Ordered this 31st day of July, 1972.

/s/ John F. Onion, Jr.
Presiding Judge, Court of
Criminal Appeals of Texas

[J.A. 157]

OPINION

[Caption same as immediately foregoing
delivered November 15, 1972; 488 S.W.2d 123 (1972)]

MORRISON, Judge.

This is an appeal from two contempt certificates against contemner, Charles Ben Howell. The first contempt was

imposed by the Honorable Dee Brown Walker. Judge Walker then transferred the matter for a hearing before another judge pursuant to Article 1911a, Section 2(c), Vernon's Ann.Civ.St.[1] That hearing was held before the Honorable Louis T. Holland. Judge Holland found the petitioner guilty of the contempt Judge Walker had cited him for. Judge Holland also held the petitioner in contempt for conduct which occurred in his courtroom during the hearing.

Thus we are faced with the determination of the validity of two separate contempts.

The record reflects that petitioner was employed by one Edna Ralston to handle a divorce proceeding against her husband, Norman Ralston. The couple were divorced in June 1968 and subsequently remarried. In 1970 the husband represented by the Honorable Gerald Coplin again filed for divorce. The action was set in Domestic Relations Court No. 3. Sometime thereafter petitioner became Edna Ralston's attorney and filed a bill of review in Domestic Relations Court No. 2 seeking to set aside the 1968 divorce judgment and praying for a divorce.

The Honorable Greer Dowell, Judge of Domestic Relations Court No. 2, instructed the litigants to take both cases before the Honorable Dan Gibbs, Judge of the Domestic Relations Court No. 3, so that both cases could be disposed of simultaneously.

Although no formal order of consolidation appears in the record, on April 12, 1971, both lawyers and their clients appeared at a hearing before Domestic Relations Court No. 3 to determine the status of the cases. The record further reflects that there was correspondence between relator and

[1] [Footnote containing text of statute here omitted].

Mr. Coplin concerning the cases on April 7, 1971. On May 24, 1971, both lawyers were instructed by Judge Gibbs to have the minor children before the court on June 2, 1971, so that the court could determine matters concerning their custody and visitation with their mother.

On May 26, 1971, just two days after Judge Gibbs had scheduled the hearing for June 2, 1971, relator appeared before the Honorable Dee Brown Walker, Judge of the 162nd Judicial District Court, sitting for the judge of the Domestic Relations Court No. 2, and presented Judge Walker with the file of the bill of review and divorce proceeding from Domestic Relations Court No. 2 and moved for a default judgment on the grounds that no answer had been filed therein. Relator's own testimony reflects that he did not tell Judge Walker about the hearing set for June 2, 1971, and did not reveal the fact, even when directly questioned, that there was another case pending and that he and Mr. Coplin had appeared before Judge Gibbs in both cases just two days before. Acting upon the representations by the petitioner, Judge Walker entered a default judgment awarding custody of the minor children to Edna Ralston, petitioner's client, even though relator was aware that that very matter was set for a hearing on June 2, 1971, in Domestic Relations Court No. 3.

Upon discovering petitioner's fraudulent action, Judge Walker issued a "Declaration and Certificate of Contempt" in which he set forth petitioner's professional misconduct described above as well as other conduct of petitioner growing out of this same divorce litigation which is unnecessary for this court to consider in a determination of the validity of these contempt orders before us here. According to Judge Walker's order, the Certificate was issued under the authority of Article 1911a, supra. He

assessed petitioner's punishment at three days (72 hours) in jail and a fine of $100.

Judge Walker further found that the petitioner was entitled to a hearing on "such contempt and determination of proper punishment thereof by a judge other than this judge."

On July 27, 1972, the petitioner and a representative of the District Attorney's office appeared before Judge Holland, a retired judge sitting in the Domestic Relations Court No. 2, to determine whether petitioner was guilty or innocent of the contempt. During the hearing Assistant District Attorney John Tolle asked him to name the four lawyers he contended he had asked to assist him. Petitioner declined to answer. Mr. Tolle moved the court to hold him in contempt and the court ordered him to answer the question. His refusal to do so to the court resulted in an order of contempt finding him guilty thereof and assessing his punishment at 30 days in jail and a fine of $500.

[1, 2] As we interpret Article 1911a, supra, when a court finds an officer of the court guilty of contempt and assesses his punishment for such contempt, the contemner has a right to have a judge, other than the offended court, determine whether or not he is actually guilty. Whatever punishment has been set by the offended court is, likewise, subject to readjudication by the "judge to be appointed for that purpose" just as his "guilt or innocence". Although it appears that Judge Walker may have had to go outside the immediate occurrence of the contemner's appearance before him on the occasion in question, our construction of the statute makes it unnecessary to determine whether or not the conduct cited by Judge Walker represents direct or constructive contempt. Once Judge Walker held petitioner

in contempt and certified the case to another judge pursuant to Article 1911a, Section 2(c), supra, he fulfilled all his requirements for holding an "officer of the court" guilty of contempt. It then became incumbent upon the judge to whom the case was certified to determine petitioner guilty or innocent. After an examination of the record we conclude that there was sufficient evidence for Judge Holland to find petitioner was guilty of the contempt Judge Walker cited him for.

Next, we must determine whether under Article 1911a, Section 2(c), supra, Judge Holland was required to transfer the case of contempt to another judge for determination after he held the petitioner guilty of contempt during that hearing. It is the appellant's contention that, since he was before Judge Holland as an attorney, he was entitled to a hearing before another District Judge under Article 1911a, Section 2(c), supra.

[3] We do not agree. When appellant made a motion for continuance he was acting as an attorney, but when he took the witness stand to testify in support of his motion for continuance he lost his status as an officer of the court and became a witness and subject to a finding of direct contempt by Judge Holland. See Ex parte Norton, 144 Tex. 445, 191 S.W.2d 713; Ex parte Aldridge, 169 Tex.Cr.R. 395, 334 S.W.2d 161.

[4] Another of petitioner's contentions is that since Article 1911, V.A.R.C.S., was repealed without a saving clause and since the original act was committed before Judge Walker on May 26, 1971, prior to the effective date of Article 1911a (August 30, 1971), any proceedings instituted thereafter under such Article were void. We do not agree. The amendment of Article 1911, supra, did not alter the power of Judge Walker to punish the appellant by a

three-day confinement and a fine of $100. This power Judge Walker had under Article 1911, supra, prior to its amendment. The effect of the amendment was to increase the possible punishment and to provide a different forum for the punishment for an officer of the court who had been found guilty of contempt. The matter was set for hearing under Article 1911a, supra, before Judge Holland.

[5] Appellant further contends that Judge Holland was not qualified to act in his case because he is a retired judge and not "a judge of a district court, other than the offended court" as provided by Article 1911a, Section 2(c), supra. Article 6228b, Section 7, V.A.R.C.S., provides that a retired district judge may be assigned to sit in a district court ". . . and while so assigned, shall have all the powers of judges thereof". We hold Judge Holland, the Presiding Judge of the 8th Administrative Judicial District (Article 200a, Section 2, V.A.R.C.S.) who is also a retired district judge, is qualified, upon assignment, to act as "a judge of a district court", pursuant to Article 1911a, supra.

[6-8] Appellant challenges the constitutionality of Article 1911a, supra, on the ground that it is violative of due process and equal protection because it fails to provide for trial by jury. It is axiomatic that courts have the power to punish for contempt without the intervention of a jury. He further attacks the statute because it increases the punishment from that provided by the former Article 1911, V.A.R.C.S. The mere increase in the punishment could in no wise affect the constitutionality of the Act. Reliance upon In Re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942, is misplaced. That case did not deal with the type of contempt involved in these cases and expressly so stated.

In Re Murchison, supra, is the only case cited in support of appellant's constitutional challenge.

[9] He further contends that such statute provides for punishment prior to a determination of guilty or innocence. We do not so view it. While the statute permits a judge to assess punishment, the enforcement of such punishment is held in abeyance until a determination of guilt or innocence is made by another judge.

We have concluded that the statute is not subject to the attacks of unconstitutionality leveled against it by the appellant.

Having concluded both orders of contempt are valid, the judgments are affirmed.

[J.A. 202-207]

ORDER [AFFIRMING CASE]

[Caption as immediately foregoing; entered November 15, 1972]

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

[J.A. 208]

ORDER ON REHEARING

[Caption as immediately foregoing;
entered January 10, 1973]

This cause came on to be heard on the relator's motion for rehearing and the same being considered, it is ordered, adjudged and decreed by the Court that said motion be and the same is hereby in all things overruled.

[J.A. 215]

Proceedings In The Supreme Court

SUPREME COURT OF THE UNITED STATES; CHARLES BEN HOWELL V. CLARENCE JONES, SHERIFF, DALLAS COUNTY, TX; NO. 72-1448; ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

ORDER

[Entered October 9, 1973; 414 U.S. 803]

Motion of Criminal Trial Lawyers Association of Northern California for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question.

APPELLANT'S PETITION TO REHEAR AND ALLOW VOLUNTARY DISMISSAL UNDER RULE 60(2)

[Caption as immediately foregoing;
filed October 22, 1973]

By this appeal, the appellant, an attorney sought relief from contempt orders entered by a state court. On October 9, this Court ordered dismissal for want of a substantial

federal question. Appellant would request that the Court reconsider its order, but, anticipating that the Court will not be so inclined, appellant asks that the Court's order be set aside and that he be allowed to voluntarily dismiss this cause pursuant to Supreme Court Rule 60(2).

Appellant has filed a petition for habeas corpus in the United States District Court for the Northern District of Texas, Dallas Division, Cause No. CA-3-6684-D, entitled Charles Ben Howell vs. Clarence Jones, Sheriff, Dallas County, Texas. Appellant desires to present to the District Court the same questions raised by the Jurisdictional Statement, as well as other matters. He asks that this proceedings be dismissed under *Rule* 60 in order to obviate any question as to the binding effect of this Court's decision to dismiss for want of a substantial federal question.

It is well settled that the denial of certiorari does not preclude a subsequent petition for habeas corpus on the same grounds. See Stern & G., *Sup.Ct.Prac.* (4th Ed. 1969), §5.7, pp. 213-218; *Habeas Corpus*, 1966 U.S. Code Cong. & Adm. News, 3663-3664. However, the right of a litigant to do so when he has been to the Supreme Court upon Jurisdictional Statement is not as well settled. Stern & G., *Sup. Ct.Prac.* (4th Ed., 1969), §7.1, pp. 326-327.

It is, of course, beyond doubt that the usual rules of res judicata do not apply to habeas corpus. However, there is a problem with the construction of 22 U.S.C. 2244(c) providing that "a prior judgment" of the Supreme Court shall, with exceptions, be conclusive of all matters "actually adjudicated by the Supreme Court." In *Neil v. Biggers*, 409 U.S. 188 (1972), it was held that affirmance by an equally divided court after grant of certiorari did not preclude subsequent habeas corpus. Previously, the Second Circuit reached the same conclusion in *U.S. ex rel. Radich v. Criminal Court*, 459 F.2d 745 (2-N.Y., 1972), an identical

fact situation except that the latter petitioner had come to the Supreme Court upon jurisdictional statement.

A fortiorari, the mere entry of a minute order that the case is being dismissed "for want of a substantial federal question" should not be held as a matter "actually adjudicated by the Supreme Court," if affirmance by an equally divided Court after formal briefing and argument does not have that effect. However, this Court has never ruled upon the effect of an order dismissing for want of a substantial federal question upon the right to subsequently petition for habeas corpus. Appellant presents this motion to voluntarily dismiss his case under Rule 60 in order to eliminate a question which the District Court might find to be troublesome.

The Rules do not place any limitations upon the right to dismiss one's own case. We are unable to find any decision either granting or refusing the right to voluntarily dismiss on petition for rehearing. We can see no theoretical or practical limitations which would preclude the relief requested. Motions to dismiss are ordinarily granted as a matter of course. Stern & G., *Sup.Ct.Prac.* (4th Ed. 1969) §16.7, pp. 534-535.

As required by Rule 60, it is hereby certified that this motion is made by appellant's attorney of record, all fees of the clerk have been paid and appellant has assumed the cost of this proceedings.

ORDER

[Caption as immediately foregoing;
entered November 19, 1973, 414 U.S. 1052]

Petition for rehearing and other relief denied.

Proceedings In U.S. District Court

U.S. DISTRICT COURT, N.D. TEXAS, DALLAS DIV.; CHARLES BEN HOWELL v. CLARENCE JONES, SHERIFF; NO. CA-3-66-84-D.

HABEAS CORPUS ORDER

[Entered November 30, 1973]

The Application for Habeas Corpus Relief filed by Charles Ben Howell, petitioner, came on for hearing before the court, Honorable Robert M. Hill, United States District Judge. The relevant facts of this case are adequately set out in the Texas Court of Criminal Appeal opinion which affirmed the petitioner's conviction. *Ex Parte Howell*, 488 S.W.2d 123 (Tex.Crim.App. — 1972), appeal dismissed for want of a substantial federal question, 42 U.S.L.W. 3192 (U.S. Oct. 9, 1973). The petitioner has alleged four grounds for habeas corpus relief: (1) that he was denied a trial by an impartial tribunal; (2) that the court denied the petitioner's right to cross-examine a witness for impeachment purposes; (3) that he was held in contempt during his trial for contempt for refusing to give the names of attorneys who were to represent the petitioner at his trial and that this violated his rights to freedom of association and privacy; (4) that the statute under which petitioner was convicted for contempt is unconstitutional.

The basis for petitioner's contention that he was denied a trial by an impartial tribunal is that the complaining judge discussed both orally and in writing the merits of petitioner's case with the trial judge prior to petitioner's conviction. Though some discussion between the two judges may have occurred, the record reflects adequate grounds for the conviction of the petitioner and there is no evidence that the conviction was based on grounds other

than what is reflected in the record. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). Additionally, this court has considered the communications between the complaining judge and the trial judge and is of the opinion that there has been no showing of prejudice to the petitioner as a result of these communications. Petitioner's contention that he was denied a trial by an impartial tribunal is devoid of legal merit.

Petitioner's second contention that he was denied the right to cross-examine the complaining judge for impeachment purposes is also without merit. It is clear from the record that the complaining judge denied that he delayed instituting contempt proceedings against petitioner or that he altered certain court records. As a result of those denials, the trial judge determined that further inquiry into this matter through cross-examination of the complaining judge would be immaterial. While such an inquiry may have been material to show bias and prejudice, this court is of the opinion that any error that may have been committed in regard to this contention does not rise to constitutional proportions so as to warrant habeas corpus relief. *Baker v. Hudspeth*, 129 F.2d 779 (10th Cir. 1942); *Curran v. Shuttleworth*, 180 F.2d 780 (6th Cir. 1950); *Johnson v. Bennett*, 386 F.2d 677 (8th Cir. 1967); *Sinclair v. Turner*, 447 F.2d 1158 (10th Cir. 1971).

Additionally this court finds that there was no denial of petitioner's freedom of association and right to privacy when the petitioner was held in contempt of court during his trial for contempt for refusing to submit the names of attorneys who were asked to represent the petitioner at the contempt proceedings. While the names of these attorneys were not material to the contempt proceedings, this information requested by the trial judge certainly was relevant

to petitioner's motion for continuance which was based on his allegation that he was unable to secure an attorney to represent him at the contempt hearing. Such an inquiry by the trial court was not unreasonable and the consequential determination that the petitioner was in contempt of court for refusing to respond to said inquiry does not present a basis for habeas corpus relief.

Petitioner's remaining contention challenges the constitutionality of the contempt statute under which he was convicted. *Tex.Rev.Civ.Stat.*, art. 1911a, §2(c) (1971). This court is of the opinion that this contention was properly disposed of by *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

For the foregoing reasons it is therefore ORDERED that the Petition for Habeas Corpus is hereby denied.

[J.A. 313-315]

ORDER OVERRULING MOTION FOR REHEARING

[Caption as immediately foregoing;
entered March 1, 1974]

The Petitioner's Motion for Rehearing came on for hearing before the court, Honorable Robert M. Hill, United States District Judge. The court has considered the motion and is of the opinion that the issues raised in the motion for rehearing do not present any substantial federal questions. *Ex Parte Howell*, 488 S.W.2d 123 (Tex.Crim.App. — 1972) appeal dismissed for want of substantial federal question, sub nom. *Howell v. Jones*, 38 L.Ed.2d 38 (1973) petition for rehearing and for other relief denied, 38 L.Ed. 2d 341 (1973). *See*, 28 U.S.C. §2244(c); *David v. New*

York Telephone Co., 470 F.2d 191 (2d Cir. 1972); *Ahren v. Murphy*, 457 F.2d 363 (7th Cir. 1972). Additionally, this court reasserts its findings and conclusions entered in this case on November 30, 1973.

It is therefore ORDERED that the Motion for Rehearing is overruled.

[J.A. 320]

Proceedings In The Fifth Circuit

U.S. COURT OF APPEALS, FIFTH CIRCUIT; CHARLES BEN HOWELL V. CLARENCE JONES, SHERIFF; NO. 73-3746

OPINION

[Delivered July 16, 1975; 516 F.2d 53]

Before GOLDBERG and RONEY, Circuit Judges, and [illegible]OOMS, District Judge.

RONEY, Circuit Judge:

Charles Ben Howell, a Texas lawyer, appeals the denial of habeas corpus relief from two convictions for contempt in Texas state courts. The first contempt citation resulted when Howell, as an attorney, failed to make a disclosure to the court of collateral legal proceedings concerning a divorce case he was handling, even when directly questioned by a state court judge. The second contempt conviction came during the hearing on the first contempt charge when, as a witness, Howell refused to answer a question on cross-examination, even when ordered by the trial judge to do so. The rather lengthy fact situation giving rise to the

contempt convictions is set out in the opinion of the Texas Court of Criminal Appeals. Ex parte Howell, 488 S.W.2d 123 (1972). Finding no merit to either the constitutional attack against the Texas contempt statute, or the due process attack on the contempt proceedings themselves, we affirm.

In lengthy briefs Howell raises eighteen points of error, including an attack on the constitutionality of the Texas contempt statute under which he was convicted. We find that the various points as to the constitutionality of the contempt statute have been disposed of previously by the United States Supreme Court in dismissing Howell's direct appeal from his convictions "for want of a substantial federal question." Howell v. Jones, 414 U.S. 803, 94 S.Ct. 114, 38 L.Ed.2d 38 (1973). As to the other challenges to his convictions, Howell fails to demonstrate any error of federal constitutional magnitude which is necessary for habeas corpus relief. See 28 U.S.C.A. §2254(a).

Howell was employed by a woman to represent her in divorce and child custody proceedings. He sought a default judgment because of the husband's failure to file an answer. When questioned as to why there had been no answer filed and whether he had been in contact with the husband or his attorney, Howell neglected to tell the domestic relations court judge that there was a related child custody case pending between the same parties in a neighboring court, that he had appeared with the husband's attorney just two days before in that court, and that a child custody hearing had there been scheduled. The judge entered a default judgment in favor of the wife, including an award to her of custody of the minor children. Later, upon learning the true facts, the judge set aside the default and cited Howell for contempt.

The contempt citation was heard and adjudicated by another judge pursuant to the provisions of Vernon's Ann. Tex.Rev.Civ.Stat. art. 1911a, §2(c). Before the second judge, Howell testified in his own behalf in support of a motion for continuance of the contempt hearing, stating that he had been unable to retain qualified counsel, even though he had talked with at least four lawyers, each of whom had declined to represent him. On cross-examination he was asked to name the four lawyers he had sought to assist him. He declined to do this. He claimed that his refusal to answer the question was justified under the attorney-client privilege and because he did not want to expose the attorneys he had contacted and involve them, in violation of a professional confidence.

After some colloquy in which Howell said, ". . . I have withdrawn the matter," the Court said:

> THE COURT: Mr. Howell, you give this court no alternative but to hold you in contempt of court for refusing to answer the question . . .
>
> and
>
> THE COURT: If you do not answer that question, I am going to hold you in contempt of court on this hearing.

For his failure to answer, Howell was immediately held in direct contempt of court, fined $500, and sentenced to thirty days confinement in the county jail. At the end of the hearing, Howell was found guilty of contempt for his conduct at the default judgment proceeding, fined $100 and sentenced to three days in county jail on that citation.

[1] In addition to the two criminal contempt convictions, Howell was ordered to "be confined in the Dallas County Jail until such time as he shall purge himself by

revealing the names of the said four attorneys." The contempt proceedings having terminated, Howell cannot be confined under this order since he has no further opportunity to purge himself of contempt. See Shillitani v. United States, 384 U.S. 364, 371, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966).

I.

Howell's challenges to the constitutionality of the new Texas contempt statute, Tex.Rev.Civ.Stat. art. 1911a, can be disposed of in short order, as they have already been presented to and rejected by the United States Supreme Court. Since Howell's case involved the constitutionality of a state statute the validity of which had been upheld by the Texas courts, he was authorized by 28 U.S.C.A. §1257 (2) to appeal his conviction directly to the Supreme Court. The term "appeal," as it is used with regard to the jurisdiction of the Supreme Court, denotes the right of a litigant to invoke the obligatory jurisdiction of the Court, *i.e.*, if a case is a proper one for appeal the Court must hear it. On the other hand, certiorari, the more common method of seeking Supreme Court review, invokes the Court's discretionary or permissive jurisdiction. 7B Moore's Federal Practice ¶[81-1] (2d ed. 1974). The Supreme Court dismissed Howell's appeal from the state court judgment "for want of a substantial federal question." Howell v. Jones, 414 U.S. 803, 94 S.Ct. 114, 38 L.Ed.2d 38 (1973).

[2] In considering the effect of such a disposition, Justice Brennan has noted that "[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . ." Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247, 79 S.Ct. 978, 979, 3 L.Ed.2d 1200 (1959). Likewise, our Court

has recently stated that dismissal for want of a substantial federal question by the Supreme Court is a judgment of affirmance on the merits of the issues presented by a petitioner in his jurisdictional statement. Wright v. City of Jackson, 506 F.2d 900, 902 (5th Cir. 1975). *Accord*, Ahern v. Murphy, 457 F.2d 363, 364 (7th Cir. 1972); Stern & Gressman, Supreme Court Practice 197 (4th ed. 1969); C. Wright, Law of Federal Courts 495 (2d ed. 1970).

In a §2254 habeas corpus proceeding, a prior judgment of the Supreme Court of the United States is "conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court . . . ." 28 U.S.C.A. §2244(c). Howell argues that a dismissal of an appeal to the Supreme Court for want of a substantial federal question is not an "actual adjudication" as required by §2244(c), but is more in the nature of a denial of certiorari. There is, however, a clearly recognized distinction between the effects of a dismissal for want of a substantial federal question and a denial of certiorari.

[3, 4] A denial of certiorari imports nothing as to the merits of the case. All it means is that, for whatever reasons, there were not four members of the Court who wished to consider the issues presented for review. Brown v. Allen, 344 U.S. 443, 489—497, 73 S.Ct. 397, 97 L.Ed. 469 (1953) (opinion of Frankfurter, J.); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) (opinion of Frankfurter, J.); C. Wright, Law of Federal Courts, 495 (2d ed. 1970). Summary disposition of an appeal, however, either by affirmance or by dismissing for want of a substantial federal question, is a disposition on the merits. Ohio ex rel. Eaton v. Price, *supra*; Wright v. City of Jackson, *supra*. Thus,

there is a sharp contrast between appealing from a state court's holding a state statute constitutional, and seeking review of other constitutional issues, not involving the constitutional validity of a state statute. Such "non-statutory" constitutional questions may be reviewed only by virtue of writ of certiorari, the denial of which has no dispositive significance.

[5] Although the effect of a summary disposition in terms of stare decisis principles may be arguable, a dismissal for want of a substantial federal question unquestionably settles the issues presented as between the parties and is an actual adjudication within the meaning of §2244 (c). Fusari v. Steinberg, 419 U.S. 379, 391-392, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975) (Burger, C. J., concurring); Edelman v. Jordan, 415 U.S. 651, 671, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Rios v. Dillman, 499 F.2d 329, 334 n.8 (5th Cir. 1974); Doe v. Hodgson, 478 F.2d 536, 539 (2d Cir.), cert. denied, 414 U.S. 1096, 94 S.Ct. 732, 38 L.Ed.2d 555 (1973), on application for permission to present motion under F.R. Civ.P. 60(b)(6), 500 F.2d 1206, 1207 (2d Cir. 1974).

[6] Howell also contends that in ordinary legal parlance, an issue has not been "actually adjudicated" by an appellate court unless that court holds a plenary hearing and delivers an opinion setting forth its thinking with respect to the issue. This argument is obviously fallacious, as evidenced by this Circuit's practice under Local Rule 21. This rule allows us to dispose of approximately one-third of our caseload without oral argument and without written opinion. These cases are, nevertheless, fully and actually adjudicated and our decision is an affirmance on the merits of the issues raised on appeal. Thus it is in the Supreme Court. "An unexplicated summary affirmance settles the issues for the parties." Fusari v. Steinberg, 419 U.S. 379,

391-392, 95 S.Ct. 533, 541, 42 L.Ed.2d 521 (1975) (Burger, C. J., concurring). The same rule necessarily applies to a summary dismissal for want of a substantial federal question.

Howell sought Supreme Court review by appeal on the question of the constitutional validity of the Texas statute. The summary disposition of that appeal concludes the matter and he cannot relitigate the issues in this Court.

II.

Howell has inundated the Court with "authority" in support of his various contentions that his convictions were procedurally deficient. Most of the authority, however, consists of dicta and language in opinions, the facts of which differ significantly from the circumstances of this case. Nothing can be gained by a point by point analysis of the arguments and authorities extensively briefed and argued in this case. We have carefully examined them, individually and collectively, and find no error which rises to the constitutional level required for habeas corpus relief. *See* 28 U.S.C.A. §2254(a).

[?] Several of Howell's arguments assert essential unfairness of the proceedings on the first contempt citation. For instance, he complains that because of ex parte communications between the judge who originally cited him for contempt and the judge who eventually tried him on this charge, he was denied a trial by an impartial tribunal. Before the hearing, the two judges did meet to discuss the effects of the new contempt statute on Howell's case. In addition, the citing judge prepared a memorandum for the trial judge further analyzing article 1911a. These communications, however, involved trial procedure and there is no evidence that they had any effect on the trial judge's de-

termination of the merits of the case. The legal determination that Howell's conduct was contemptuous appears only to have been made from information learned at the hearing. *See* United States v. Grinnell Corp., 384 U.S. 563, 580-583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

The leading cases cited by Howell, Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), are different from the case *sub judice*. They involved situations where there was actually some incentive to find one way or the other, *i.e.*, financial considerations (*Ward & Tumey*) or previous participation by the trying judge in the proceedings at which the contempt occurred (*Murchison*). In this case, no such incentive is evident, and the record does not otherwise support Howell's contention that he was denied a trial by an impartial tribunal.

[8, 9] Howell asserts that he was denied adequate cross-examination of the citing judge. During cross-examination of this witness, Howell was restricted in his attempt to show that the contempt citation was motivated by bias and prejudice resulting from Howell's allegations that the judge had improperly caused the alteration of documents filed in support of a motion to set aside the default. A review of the record reveals that the line of inquiry did not go to the veracity of the witness's testimony concerning the events for which Howell was found in contempt. Howell does not question that the events took place. He does argue that they do not reflect contumaciousness. The cross-examination to show bias and prejudice which motivated the contempt citation, was not material to the issue of whether Howell's conduct was

actually contumacious. Under these circumstances, any error that may have been committed in restricting cross-examination does not rise to constitutional proportions so as to warrant habeas corpus relief. *Cf.* Sinclair v. Turner, 447 F.2d 1158 (10th Cir. 1971), cert. denied, 405 U.S. 1048, 92 S.Ct. 1329, 31 L.Ed.2d 590 (1972).

[10] The remainder of Howell's arguments relate to his contempt conviction for failure to give the names of the attorneys he said he contacted to handle his case. He claims that the identity of the consulted attorneys was constitutionally protected and that the order that he supply the information intruded upon his rights of privacy, freedom of association, and assistance of counsel. The great weight of authority, however, refuses to extend the attorney-client privilege to the fact of consultation or employment, including the component facts of the identity of the client and the lawyer. 8 Wigmore, Evidence §2313 (MacNaughton Rev. 1961); McCormick Evidence §90 (2d ed. 1972); 16 A.L.R.3d 1047 (1967). Although no Texas case directly in point has been cited to us, this Court has previously held that the identity of a consulted attorney is not privileged and can be the subject of judicial inquiry. Goddard v. United States, 131 F.2d 220 (5th Cir. 1942).

[11] The cases relied upon by Howell in support of his contention that the identity of the consulted attorneys was constitutionally protected generally involved situations in which the inquiry transcended any legitimate interest of the questioner in the solicited information and was not shown to be material to the official purpose of the investigation or proceeding at hand. *See e. g.*, Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957). Here, however, Howell had renewed his motion for continuance and had attempted to support the motion by

testifying that, despite contacting four lawyers, he had been unable to secure legal assistance. In light of this motion, the prosecution was certainly entitled to verify and further develop Howell's testimony. Even though Howell attempted to withdraw this ground for his motion, the inquiry was relevant and material to possible claims of ineffective assistance of counsel. The court was entitled to an answer to the question and was not constitutionally precluded from citing petitioner for contempt when he refused to respond.

[12] After citing Howell for contempt for failure to identify the attorneys he contacted, the trial judge immediately imposed sentence, without sending the citation to another judge for review. Howell claims that this summary procedure violated his constitutional due process rights. The Supreme Court has on two occasions recently addressed the question of when contemptuous conduct may be summarily punished by the judge before whom the contempt took place.

In United States v. Wilson —— U.S. ——, 95 S.Ct. 1802, 44 L.Ed.2d —— (1975) (#73-1162), two witnesses, in disobedience of court orders, refused to testify at a criminal trial after receiving grants of immunity. As in this case, their refusals to answer, based on alleged constitutional privileges, were not delivered disrespectfully. Nevertheless, the district court summarily held them in contempt under F.R.Crim.P. 42(a). In upholding the contempt convictions thus imposed, the Supreme Court implicitly rejected Howell's constitutional argument that summary contempt cannot be imposed for the orderly refusal to answer questions.

Howell argues that an earlier case, Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974), controls the

case *sub judice* and requires that his second contempt conviction be set aside. The factual situation in *Hayes*, however, was much different from the factual situation in the case at bar. In *Hayes*, a state trial judge found a defense attorney guilty on nine counts of criminal contempt. Although the judge informed the attorney at the time of each incident that he was in contempt of court, no sentence was imposed until after the trial was over. During the trial the attorney was permitted to respond to most, but not all, of the charges against him. As the trial progressed, however, the judge's demeanor toward the attorney became increasingly discourteous. At the conclusion of the trial the judge refused the attorney's request to respond to the charges and, after making an acrimonious statement concerning his trial conduct, sentenced the attorney to a lengthy jail term and barred him forever from practicing before the court in which the case at issue had been tried.

Presented with this compelling factual situation, the Supreme Court held, in part: (1) that the summary procedures employed by the judge did not satisfy minimum due process of law, which required appropriate notice and an opportunity to be heard at the time contempt was adjudicated after the trial; and (2) that because of the acrimony of the confrontation between the judge and the contemnor, another judge should have tried the contempt matter.

Unlike the situation in *Hayes*, Howell, as a witness, was given express notice of the grounds for his contempt citation even before he committed the contempt, was warned of the consequences of his failure to comply with the trial judge's order, and was given ample opportunity to be heard at the time of the actual adjudication of contempt.

Absent from this record is the bitterness and asperity which permeated the proceedings in Taylor v. Hayes.

Under such circumstances, Howell's summary contempt conviction was not constitutionally deficient. There is no question but that he knew precisely why he was being cited for contempt. Moreover, he had an adequate "opportunity to speak in his own behalf in the nature of a right of allocution." Groppi v. Leslie, 404 U.S. 496, 504, 92 S.Ct. 582, 587, 30 L.Ed.2d 652 (1972). Finally, and significantly, the record does not reflect that at the time of the contempt the trial judge was so "personally embroiled" with Howell that he was unable to sit impartially in judgment on the contempt charge. *See* Taylor v. Hayes, *supra*; Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971). Howell's conduct did not vilify the judge. To the contrary, he was polite throughout. Neither do the judge's comments demonstrate a bias or anger against Howell. Accordingly, there was no constitutional violation in the contemned judge sitting in judgment on the contempt charge and summarily imposing sentence. *Cf.* Bell v. Hongisto, 501 F.2d 346 (9th Cir. 1974), cert. denied, —— U.S. ——, 95 S.Ct. 1351, 43 L.Ed.2d 439 (1975), a recent case with closely analogous facts.

Having examined the record in this case in light of Howell's numerous contentions of error presented both in his briefs and at oral argument, and finding no error which reaches a constitutional level, we affirm the district court's denial of the writ of habeas corpus.

Affirmed.

JUDGMENT

[Caption as immediately foregoing;
entered July 16, 1975]

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

CLERK'S NOTICE

[Caption as immediately foregoing;
dated October 6, 1975]

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

Constitutional Provisions, Statutes and Rules

The United States Constitution, Amendment Six. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The United States Constitution, Amendment Fourteen, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 *U.S.C.*, §1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 *U.S.C.*, §2244(c). In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the

judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

62nd Legislature—Regular Session

[Art. 1911a, Tex.Civ.Stats.]

COURTS—CONTEMPT—PUNISHMENT

CHAPTER 831

S. B. No. 132

An Act relating to the power and authority of certain courts, to punishment for contempt and to powers of justices of the peace; amending Article 2386, Revised Civil Statutes of Texas, 1925; amending Article 45.12, Code of Criminal Procedure, 1965; repealing Articles 1736, 1826, 1911, and 1955, Revised Civil Statutes of Texas, 1925, and Section 2, Article 4.04, Code of Criminal Procedure, 1965; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Inherent power and authority of courts

Section 1.[29] A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

Penalties for contempt

Sec. 2.[30] (a) Every court other than a justice court or municipal court may punish by a fine of not more than $500, or by confinement in the county jail for not more than six months, or both, any person guilty of contempt of the court;

(b) A justice court or municipal court may punish by a fine of not more than $200, or by confinement in the county or city jail for not more than 20 days, or both, any person guilty of contempt of the court;

(c) Provided, however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred.

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[29]Vernon's Ann.Civ.St. art. 1911a, §1.

[30]Vernon's Ann.Civ.St. art. 1911a, §2.

Confinement to enforce order

Sec. 3.[31] Nothing in this Act affects a court's power to confine a contemner in order to compel him to obey a court order.

Sec. 4. Article 2386, Revised Civil Statutes of Texas, 1925, is amended[32] to read as follows:

"*Art.* 2386. *Other powers*

"Justices of the peace shall also have power:

"1. To issue writs of attachment, garnishment and sequestration within their jurisdiction, the same as judges and clerks of the district and county courts.

"2. To exercise jurisdiction over all other matters not hereinbefore enumerated that are or may be cognizable before a justice of the peace under any law of this State.

"3. To proceed with all unfinished business of his office in like manner as if such business had been originally commenced before him."

Sec. 5. Article 45.12, Code of Criminal Procedure, 1965, is amended to read as follows:

"*Art.* 45.12. *Contempt and bail*

"The recorder shall have power to admit to bail, and to forfeit bonds under such rules as govern such taking and forfeiture in the county court."

Sec. 6. Articles 1736, 1826, 1911, and 1955, Revised Civil Statutes of Texas, 1925, are repealed. Section 2, Article 4.04, Code of Criminal Procedure, 1965, is repealed.

---

[31]Vernon's Ann.Civ.St. art. 1911a, §3.

[32]Vernon's Ann.Civ.St. art. 2386.

Emergency

Sec. 7. The importance of this legislation and the crowded condition of the calendars in both Houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and this Rule is hereby suspended; and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed the Senate on March 31, 1971, by a viva voce vote; May 31, 1971, Senate concurred in House amendments by a viva voce vote; passed the House, with amendments, on May 31, 1971, by a non-record vote.

Approved June 9, 1971.

Effective Aug. 30, 1971, 90 days after date of adjournment.

Art. 1911, *Tex.Civ.Stats., May Punish For Contempt.* The district court may punish any person guilty of contempt of such court by fine for exceeding one hundred dollars, and by imprisonment not exceeding three days.

Texas Constitution, Article I, Sec. 10. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.* * *

Tex. Code Crim.Proc., Ch. 45, JUSTICE AND CORPORATION COURTS * * * *Art.* 45.25. If the accused does not waive a trial by jury, the justice shall issue a writ commanding the proper officer to summon forthwith a venire from which six qualified persons shall be selected to serve as jurors in the case. * * *

Tex. Code Crim.Proc., Art. 4.03. The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court or county court at law shall not exceed one hundred dollars.

Tex.Code Crim.Proc., Art. 4.08. The county courts shall have appellate jurisdiction in criminal cases of which justice courts and other inferior courts have original jurisdiction.

Tex.Code Crim.Proc., Art. 44.02. A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed.

Tex.Code Crim.Proc., Art. 44.17. In all appeals from justice and corporation courts to the county court, the trial shall be de novo in the trial in the county court, the same as if the prosecution had been originally commenced in that court.

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 2 1976
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-953

CHARLES BEN HOWELL,

Petitioner,

v.

CLARENCE JONES, Sheriff,
Dallas County, Texas,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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CHARLES BEN HOWELL,

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CLARENCE JONES, Sheriff,
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Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

This Brief in reply to the Petition for Certiorari is respectfully submitted on behalf of the Respondent Clarence Jones, Sheriff of Dallas County, Texas.

STATEMENT OF THE CASE

Charles Ben Howell, a Texas lawyer, appeals two State court convictions for contempt. The first contempt citation resulted when Howell, acting as the attorney in a divorce case, failed to disclose to the trial judge the existence of an important collateral legal proceeding, even though directly questioned by the trial judge. The second contempt citation

came during the hearing on the first contempt charge when Howell, as a witness testifying in support of a Motion for Continuance, refused to answer a question on cross-examination, even though directly ordered to do so by the judge.

More specifically, the record shows that Howell represented a woman client in a divorce and child custody proceeding. Howell sought a default judgment because the husband's attorney had not filed an answer. Prior to the granting of the default judgment, the trial judge (Judge Dee Brown Walker) asked Howell: "I wonder why Gerry (i.e. the husband's attorney)[1] didn't file an answer." Howell replied: "That we don't know." (J.A. 87).[2] The trial judge next asked Howell: "Have you talked to Gerry about the case?" Howell responded: "I have called Mr. Copeland's (sic) office several times and haven't gotten a response." (J.A. 87). Finally, the judge asked: "But, you haven't ever received an answer from him, umm?" Howell answered: "No." (J.A. 87). The trial judge then granted the default judgment.

However, the record reveals that another lawsuit involving the same parties and subject matter was pending in a neighboring court. In fact, Howell and the husband's attorney had appeared in that court just two days prior to the granting of the default judgment in Judge Walker's court. (J.A. 94). At that time, the pending lawsuit was re-set for approximately one week. A hearing on the custody of the children was to be held on this later date. Two days later,

---

1 Explanatory portion added by Respondent.

2 For uniformity, the Respondent has adopted the Petitioner's method of record designation; (J.A.) refers to the Joint Appendix filed with the Clerk of the Fifth Circuit, U.S. Court of Appeals.

however, Howell obtained the default judgment in Judge Walker's court. (J.A. 100). The default judgment included an order that awarded custody of the children to Howell's client. (J.A. 105).

Upon learning the true facts, Judge Walker set aside the default judgment and cited Howell for contempt. Later, at the contempt hearing, Howell was asked: "You don't consider that (i.e. the failure to disclose the other lawsuit)[3] concealing material facts from Judge Walker?" Howell answered: "I consider that the law is an adversary proceeding, sir, and that I wasn't obligated to disclose any special defenses that the Defendant possessed." (J.A. 100).

Judge Lewis Holland presided over the contempt hearing. In support of a Motion for Continuance, Howell testified that he was unable to retain qualified counsel, even though he had talked with "no less than four lawyers," all of whom had declined to represent him. (J.A. 41). However, on cross-examination, Howell refused to disclose the names of the four lawyers. (J.A. 41). Even when the court instructed Howell to answer, he refused. (J.A. 42). Accordingly, Howell was held in direct contempt of court and punishment was assessed at $500 and thirty days in jail. At the conclusion of the hearing, the court found Howell guilty of contempt for his conduct at the default judgment proceeding and assessed punishment at $100 and three days in jail.

The Texas Court of Criminal Appeals upheld the orders of contempt. *Ex parte Howell*, 488 S.W.2d 123 (Tex. Crim.

[3] Explanatory portion added by Respondent.

App. 1972). The Petitioner then appealed the case directly to this Court pursuant to 28 U.S.C. Sec. 1257(2). This Court dismissed the appeal "for want of a substantial federal question." *Howell v. Jones,* 414 U.S. 803, 94 S.Ct. 114, 38 L.Ed. 2d 38 (1973). The Petitioner next filed a habeas corpus petition in the U.S. District Court. The writ was denied. (J.A. 313-315). Such denial was, in turn, affirmed by the U.S. Court of Appeals. *Howell v. Jones,* 516 F.2d 53 (5th Cir. 1975). Again, this Court has been petitioned.

ARGUMENTS

I.

THE PETITIONER RECEIVED A FAIR TRIAL BEFORE AN IMPARTIAL TRIBUNAL.

[In Reply to Petitioner's Question One]

The Petitioner complains that he was denied a fair trial before an impartial tribunal because of ex parte communications between Judge Walker and Judge Holland. Judge Holland presided over the contempt hearing. The record, however, does not support the Petitioner's contention.

Prior to the contempt hearing, the two judges met to discuss the effects of the new Texas contempt statute (Article 1911a, Tex. Rev. Civ. Stat. Ann.). This statute was newly enacted and the conversation between the two judges merely concerned the interpretation of the new statute. (J.A. 279-280). In addition, Judge Walker sent Judge Holland a letter that further interpreted the statute. (J.A. 260). These communications, however, did not concern the actual facts surrounding the contemptuous conduct. As stated in *United States*

v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed. 2d 778 (1966):

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

In the present case, the record reflects that Judge Holland's ruling was based solely on the testimony adduced at the contempt hearing. (J.A. 276).

Finally, assuming arguendo that the above-mentioned communications disqualified Judge Holland from ruling on the original contempt citation, nevertheless such communications did not affect the second contempt conviction. The Petitioner's refusal to comply with Judge Holland's direct instructions was unaffected by such communications.

II.

THE TEXAS CONTEMPT STATUTE IS CONSTITUTIONAL.

[In Reply to Petitioner's Questions Two, Three and Four]

The Petitioner next challenges the constitutionality of the Texas contempt statute (Article 1911a, Tex. Rev. Civ. Stat. Ann.). The Petitioner attacks this statute on seven grounds. However, these identical grounds were previously presented to this Court by way of appeal. (J.A. 218-230). In *Howell v. Jones*, 414 U.S. 803, 94 S.Ct. 114, 38 L.Ed. 2d 38 (1973), this Court dismisstd such appeal "for want of a substantial federal question." Such disposition was an adjudication on the merits. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, S.Ct. 978, 3 L.Ed. 2d 1200 (1959). Furthermore, that adjudication was

conclusive as to the issues now raised. See 28 U.S.C. Sec. 2244(c).

CONCLUSION

It is therefore respectfully submitted that this Court should deny the application for writ of certiorari.

Respectfully submitted,

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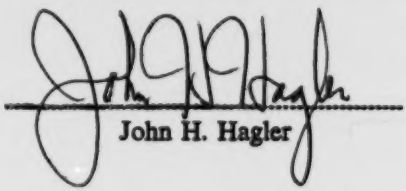
Attorneys for Respondent.

CERTIFICATE OF SERVICE

I, John H. Hagler, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Respondent's Brief on counsels for Petitioner, by depositing three copies of the said Brief in the U.S. Mail, First Class Postage Prepaid, on this the 29th day of January, 1976, addressed to H. Averil Sweitzer, 226 Lakewood Tower, Dallas, Texas 75214, and Howard D. Pattison, 105 S. Prairieville Street, Athens, Texas 75751, as counsels of record for Petitioner.



John H. Hagler

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IN THE

Supreme Court Of The United States

October Term, 1975

NO. 75-953

Charles Ben Howell ..... *Petitioner*

V.

Clarence Jones, Sheriff
Dallas County, Texas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE COMMITTEE TO OBTAIN A FAIR TRIAL FOR CHARLES BEN HOWELL AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

Supreme Court Of The United States

October Term, 1975

NO. 75-953

Charles Ben Howell ..... *Petitioner*

V.

Clarence Jones, Sheriff
Dallas County, Texas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE COMMITTEE TO OBTAIN A FAIR TRIAL FOR CHARLES BEN HOWELL AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Committee to Obtain a Fair Trial for Charles Ben Howell respectfully submits this brief pursuant to Rule 42 of the Rules of the Supreme Court of the United

States. Both Petitioner and Respondent have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

This Amicus, the Committee to Obtain a Fair Trial for Charles Ben Howell, was formed specifically for the purpose of expressing the concern of its members to the Supreme Court of the United States with respect to the improprieties or indiscretions committed by the judge convicting Charles Ben Howell of contempt by engaging in ex parte communications during the pendency of the case before him.

The names and occupations of persons supporting and contributing to the efforts of this Committee are listed in the appendix hereto. The large majority of them are attorneys, one being a law professor, and the others practicing attorneys.

This case has received wide-spread attention in and around Dallas, Texas. Many practicing lawyers other than those listed herein have expressed concern as to the fairness of the Howell trial, or have otherwise expressed sympathy with the objectives of this Amicus. However, they have advised the Committee that they would deem it indiscreet in their particular situation to openly offer support to this committee.

SUMMARY OF ARGUMENT

One of the prime reasons for the filing of this Amicus Brief is that none of the courts reviewing these conviction has given any express consideration whatever to the three authorities which Amicus deems to be controlling:

1.

Commonwealth Coatings Corp. v. Continental Casualty Co., et al, 393 U.S. 145, 21 L.Ed.2d 301, 89 S.Ct. 337, reh. den. 393 U.S. 1112, 21 L.Ed. 2d 812, 89 S.Ct. 848.

2.

The Code of Judicial Conduct, adopted by American Bar Association, August 16, 1972, Canon III, Article A, Sec. (4).

3.

American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge, adopted August, 1972, Standard 1.2, Standard 1.5, and Standard 1.6.

The United States Supreme Court reversed the Commonwealth Case because the "judge" failed to disclose his past business dealings with one of the

parties. The Court stated that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." The new Judicial Canons and ABA Standards reflect that Judge Holland's conduct in failing to disclose his relations with Judge Walker and the Special Prosecutor was improper. This is not a personal attack on Judge Holland. We assume that he is intrinsically a fair-minded man and that these improprieties resulted from a misunderstanding on his part of his proper judicial responsibilities. Nevertheless, these indiscretions have created an "appearance of bias," which only can be cured by reversal for trial before a judge who is not a party to the impropriety. See Commonwealth Coatings Corp. v. Continental Casualty Co., supra.

It is the position of Amicus that the case is of substantial public importance. The new Canons and Standards adopted by the ABA have received extensive approval and praise. However, they will become mere empty shells unless they are implemented. The only way to implement them is to reverse the case where there is a significant violation thereof. The United States Supreme Court has announced a number of prophylactic decisions in recent years designed to protect the defendant's right to a fair trial and to uphold the dignity of the Courts. It is impossible to X-ray Judge Holland's mind to decide if he really was influenced. However, it is easy to see that he failed to comply with the requirements forbidding ex parte communications. The only way to control situations like this is to place a duty of disclosure on the judge and reverse the case when the judge fails to disclose ex parte communications received or made by him.

STATEMENT OF THE CASE

The orders, judgments and opinions necessary to an understanding of the case are contained in "Petitioner's Appendix," pages P.A. 1-42, attached to the Petition for Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit is found at pages P.A. 30-41. The Petitioner's "Statement of the Case" is found on his pages 19-24. A further statement of the facts relating to the ex parte discussions between Judge Holland, Judge Walker and the Special Prosecutor, Mr. Coleman, is found on Petitioner's pages P.A. 24-28. The confidential letter which Judge Holland received from Judge Walker and failed to disclose is on pages 28A and 28B of the Petition for Certiorari. On pages P.A. 50-51, Petitioner quotes Judge Holland's testimony as to how he advised Judge Walker that he, Judge Holland, was putting the burden of proof on the defendant. This Amicus has examined the briefs filed by Respondents in the Courts below. It does not appear that Respondent has any substantial dispute regarding the facts as stated by Petitioner. The facts already stated constitute a sufficient basis for the understanding of the points made in this Brief Amicus Curiae. This Amicus will only submit a further facts statement as follows:

For some time, Charles Ben Howell has been a controversial Dallas lawyer. He has repeatedly been an outspoken candidate for judicial office in the Dallas County Courthouse. In the course of his campaigns, his name has numerously appeared in the local press as

being critical of various practices and procedures in the Dallas County Courthouse and has expressed dissatisfaction with the performance of the incumbent judges.

In *March* of 1972, the Honorable Dee Brown Walker held Petitioner Howell in contempt for Petitioner Howell's conduct during the previous *May* at a default judgment hearing. Petitioner contends that the proceedings were, in fact, brought in retaliation for having charged Judge Walker, a little over a month previous, with tampering with court papers.

Petitioner Howell was not sent to jail immediately because of the provisions of Article 1911(a), Vernon's Texas Civil Statutes, Ann., providing that a lawyer must be released on personal recognizance bond "pending a determination of his guilt or innocence by a judge of a district court, other than the offended court."

The Hon. Louis T. Holland was appointed to hold the contempt hearing. During the hearing, Mr. Howell caught a glimpse of a personal letter from Judge Walker to Judge Holland, which copy was in the possession of the Prosecutor. Both Judge Walker and the Texas Court of Criminal Appeals refused to provide petitioner with a copy of this private letter or to order it to be provided. However, after Petitioner filed his habeas petition in the United States District Court for the Northern District of Texas, he was permitted to take the depositions of the two judges and the special prosecutor. Petitioner obtained a copy of the letter which is contained on Pages

28A and 28B of the petition for certiorari. In addition, it was disclosed in the course of these depositions that there had been an ex parte pre-trial conference between the trying judge, the complaining judge and the special prosecutor. All three parties to this meeting were extremely vague as to what took place.

However, one fact did clearly come out in the depositions, a fact which your Amicus believes to be most significant. During the course of his deposition, Judge Holland conceded that he notified Judge Walker that, he, Judge Holland, was in agreement with Judge Walker's argument concerning burden of proof.

Judge Walker argued in his letter of July 14, 1972 as follows:

> "It is our understanding that the determination of the certificate of contempt is the primary fact finding and that the burden of going forward will rest on Charles Ben Howell to rebut the determination heretofore made."

Judge Walker continued as follows:

> "My understanding of the proceeding would be to confirm the declaration and certificate of contempt by nominal testimony as to the facts upon which the court has concluded contempt, and then consider what defense, if any, Mr. Howell has before adjuging him guilty or innocent and fixing his punishment, if any."

In other words, Judge Walker was arguing that he, Judge Walker, had already convicted Petitioner

Howell and that the hearing before Judge Holland was a limited hearing for the purpose of giving Petitioner a chance to disprove the conviction against him. Judge Holland's testimony was that he told Judge Walker as follows:

> "I told him I thought he needed to make his own findings and set his own contempt fine and then it would be up to the new judge to review that and tell him whether or not it was an abuse or whether it was justified."

Judge Holland also testified that his discussions with Judge Walker were to the effect that "the other judge was called in to review, I thought that he had a job to review." In other words, Judge Holland's own testimony reflects that he sustained Judge Walker's argument. He placed Petitioner Howell under the burden of disproving the conviction filed against Petitioner Howell by Judge Walker.

Petitioner Howell argues that these procedures under Article 1911(a), Vernon's Texas Civil Statutes, Anno., constitute a denial of Due Process and Equal Protection guaranteed by the Fourteenth Amendment to the United States Constitution. Your Amicus suggests that the point is a strong one, but it will not be briefed by this Amicus.

We, therefore assume, for the purpose of argument, that the legal construction urged by Judge Walker was correct and that Judge Holland's ruling was a correct statemet of law. It makes no difference. A

party is still entitled to trial before a fair and impartial tribunal. A judge who enters into ex parte communications and lends a private ear to the opposition and who submits his rulings only to one party has conducted himself so as to deprive the trial of the necessary appearance of fairness and impartiality in order to maintain public confidence in the judiciary and its decisions. The case must be reversed for trial before another judge.

REASONS FOR GRANTING THE WRIT

This Amicus Curiae believes and urges the Court that the case is controlled by Commonwealth Coatings Corp. v. Continental Casualty Co., et al, 393 U.S. 145, 21 L.Ed.2d 301, 89 S.Ct. 337, reh. den. 393 U.S. 1112, 21 L.Ed. 2d 812, 89 S.Ct. 848. That case involved an arbitration proceedings. The arbitrator in that case was the operator of a consulting business. The arbitrator had been employed from time to time by one of the parties, but he was not employed by that party at the time of the arbitration. The Supreme Court, speaking through the Honorable Mr. Justice Black, took the position that inasmuch as the employment was all a past matter, it would have been harmless if reasonable disclosure had been made. *However, the failure to make disclosure required the reversal of the case.* This Court stated in part:

> "Neither this arbitrator nor the prime contractor gave to petitioner even an intimation of the close financial relations that had existed between them

> for a period of years. We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge. This is shown beyond doubt by Tumey v. Ohio, 273 U.S. 510 (1927) where this Court held that a conviction could not stand because a small part of a judge's income consisted of court fees collected from convicted defendants. Although in Tumey it appeared the amount of the judge's compensation actually depended on whether he decided for one side or the other, that is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case. Nor should it be at all relevant, as the Court of Appeals apparently thought it was here, that 'the payments received were a small part of (the arbitrator's) income. . .' for in Tumey the Court held that a decision should be set aside where there is 'the slightest pecuniary interest' on the part of the judge, and specifically rejected the State's contention that the compensation involved there was 'so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty . . . .' Since in the case of courts this is a *constitutional* principle, we can see no basis for refusing to find the same contempt in the broad statutory language that governs arbitration proceedings."

The United States Supreme Court went on to hold as follows:

> "We should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than

> judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."

Under Texas law, there is no right to trial by jury in a contempt case and a conviction for contempt may not be appealed. While the writ of habeas corpus is available to review a contempt conviction in Texas, the Texas courts have numerously stated that the review is of a limited scope. Petitioner has attacked the constitutionality of Article 1911 (a), Vernon's Texas Civil Statutes, Ann., as being in violation of the Due Process and Equal Protection Clauses of the United States Constitution for the denial of jury trial and the right of appeal. Your Amicus Curiae takes the position that Petitioner has presented a strong argument in this regard. However, again, this Amicus Curiae Brief does not cover those points.

We therefore assume, for the purpose of argument, that the Texas law is constitutional and that neither the denial of trial by jury or denial of the right of appeal denies any Constitutional Rights. However, just as in Commonwealth Coatings Corp. v. Continental Casualty Co., et al supra, this Texas procedure gives the judge "completely free rein to decide the law as well as the facts." The case is "not subject to appellate review." Thus, it is obvious that Judge Holland's failure to "disclose to the parties any dealings that might create an

impression of possible bias" is even more serious than it would be in an ordinary case subject to the normal laws of procedure specifically designed to safeguard the rights of the accused.

There is another aspect of Commonwealth Coatings Corp. v. Continental Casualty Co., supra, which is extremely important. The United States Supreme Court held that Section 18 of the Rules of the American Arbitration Association were "highly significant." That section requires a prospective arbitrator to "disclose any circumstances likely to create a presumption of bias." The Court also quoted Canon 33 of the old Canons of Judicial Ethics holding that a judge should be "careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct."

Your Amicus argues that Canon 33 of the Old Judicial Canons, supra, is broad enough to include ex parte communications. Certainly, Judge Holland's negotiations constituted social or business relations or friendships of the type that would awaken the suspicion that they had constituted an element in influencing his judicial conduct. Moreover, your Amicus draws the Court's attention to Canon 17 of the old Canons of Judicial Ethics. See American Bar Association, Canons of Professional and Judicial Ethics, 1957 Edition, page 49:

JUDICIAL CANON 17.
EX PARTE COMMUNICATIONS

> "A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.
>
> "While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel."

According to the Foreword, page ix, in that book, Judicial Canon No. 17 was adopted on July 9, 1924 and amended on September 30, 1937. For the same effect, see Canon 11 adopted by the Judicial Section of the State Bar of Texas in 1964 and quoted on page 46 of the Petition for Certiorari.

Your Amicus would argue that, if a failure to disclose "dealings that might create an impression of possible bias" disqualifies an arbitrator, then it must disqualify a judge. The United States Supreme Court has ruled that "in the case of courts this is a *constitutional* principle." The Supreme Court's opinion further relies upon Codes of Ethics as being "highly significant" in determining whether or not the judicial officer has failed to "disclose to the parties any dealings

that might create an impression of possible bias." The Honorable Mr. Justice Black concluded on behalf of the Supreme Court as follows:

> "This rule of arbitration and this canon of judicial ethics rests on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Your Amicus Curiae draws attention to the words "any tribunal." Your Amicus Curiae argues that if there is any significant distinction between Commonwealth Coatings Corp. v. Continental Casualty Co., supra and the case of Howell v. Jones, 516 F.2d 53, we fail to grasp it. They are both cases of failure to disclose. As the Supreme Court carefully pointed out, the arbitrator was not in the employment of the opposing party at the time of the arbitration. Thus, it was not a case where the arbitrator had a financial stake in the case itself as in the old case of Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437. The opinion in Commonwealth Coatings Corp. v. Continental Casualty Co., supra, condemned the judicial officer not because he had a financial stake in the case, but because he failed to disclose "circumstances likely to create a presumption of bias." In Tumey v. Ohio, supra, the judicial officer could not have cured his disqualification by disclosing his financial stake in the case whereas in Howell v. Jones, supra, all Judge Holland had to do was to disclose that he had gotten this letter and to decline to participate further in Judge Walker's attempt to bend his ear privately by the letter of July 14.

While your Amicus agrees that judges do not have to give up their social or business relations or friendships in order to be judges, they do have to make reasonable disclosure. Certainly, they have to do so when those social or business relations or friendships have included discussions regarding the very case pending before the court. The ultimate holding of the United States Supreme Court in this case is that "the appearance of bias" must be avoided and that the only proper means of avoiding it is full disclosure.

What are the grounds for distinguishing Commonwealth Coatings Corp. v. Continental Casualty Co., supra? For certain, the distinction cannot be based on the fact that one case involves an arbitrator and the other case involves a judge. The distinction cannot be based on the fact that Petitioner Howell's case is a criminal proceedings whereas Commonwealth Coatings Corp. v. Continental Casualty Co., supra, was a civil matter. If there is any distinction in this area, it has to be the other way around. The higher standard must be applied in criminal matters. The distinction cannot be based on the fact that Petitioner Howell's case arose in the State Court and comes here for review for deprival of Constitutional rights while Commonwealth Coatings Corp. v. Continental Casualty Co., supra, involved the federal arbitration statute. The opinion of the Supreme Court holds that in the case of courts, a fair and impartial judge "is a *constitutional* principle."

The only possible grounds for distinguishing the two cases, as we see it, is to say that the judicial officer

has a burden to disclose prior financial dealings with the parties one side or the other, but he has no obligation to disclose the fact that he engaged in ex parte communications with the parties, one side or the other. This grounds of distinction, your Amicus believes, simply will not hold water. It is a bad theory, bad policy and bad law.

The United States Court of Appeals for the Fifth Circuit took the position that "there is no evidence that they (meaning the ex parte communications) had any effect on the trial judge's determination of the merits of the case." The Fifth Circuit Court went on to say that "the legal determination that Howell's conduct was contemptuous appears only to have been made from information learned at the hearing." Your Amicus Curiae argues that the Fifth Circuit Court opinion has closed the door. The Fifth Circuit Court held that it is not possible to obtain relief on the grounds of ex parte communications unless it can be proved that the judge was actually influenced.

This Amicus Curiae replies as follows:

First, the Fifth Circuit Court has laid an impossible burden of proof on the injured party. How can you ever X-ray the mind of a judge to prove that he was or was not influenced or that he did or did not make his legal determination solely "from information learned at the hearing?"

Secondly, this holding is dead opposite to the holding in Commonwealth Coatings Corp. v. Continental Casualty Co., supra, where the United States Supreme Court said that "*any tribunal*" which certainly would include judges, "not only must be unbiased but also must avoid even the appearance of bias."

Thirdly, your Amicus Curiae, with all due respect, argues that the decision of the Fifth Circuit Court is a dangerous precedent. It is dangerous from the standpoint that it has saddled the injured party with an intolerable burden of proof. The injured party is lucky to even find out that the judge has been talking out of school, much less ex parte discussions. If you hold that he also has to prove that the judge was actually influenced, you might as well go ahead and lay it on the line and say that there is no way that this type of breach of judicial discretion can be remedied. This is not the law. For sure, this is not what the law should be.

During the last several years, ethics in government has become a big issue. Full disclosure laws, open records laws, and codes of ethics are popping up all over the place. The legal profession and the judiciary are not behind the trend. In fact, they are at the head of the trend.

The American Bar Association has adopted a New Code of Judicial Conduct. Canon III, Article A, Sec. (4), states as follows:

> "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond."

This Canon is printed in a special section at the rear of Volume VI of the Martindale-Hubbell Legal Directory, 1976 Edition page 58C. According to the Preface, pages 55-56c, the Special Committee on Standards of Judicial Conduct which authored these Canons is a group of outstanding judges and lawyers. In particular, your Amicus notices the names of the Honorable Mr. Justice Stewart, Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit, and Judge Edward T. Gignoux, United States District Judge from the District of Maine. The Chairman was retired Chief Justice Roger J. Traynor from the Supreme Court of California.

Your Amicus also calls the Court's attention to the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge, also adopted in 1972. Standard 1.2 provides as follows:

"The trial judge should be familiar with and adhere to the canons and codes applicable to the judiciary, the code of professional responsibility applicable to the legal profession, and standards concerning the proper administration of criminal justice."

Standard 1.5 provides as follows:

"The trial judge should avoid impropriety and the appearance of impropriety in all his activities, and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. He should not allow his family, social or other relationships to influence his judicial conduct or judgment."

Standard 1.6 provides as follows:

"The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with him ex parte, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice."

In the "Commentary" under Standard 1.6, it is stated that "even when entirely innocent, *ex parte* discussions of pending cases have the appearance of partiality and therefore should be strictly avoided."

There was no shortage of distinguished jurists and lawyers on the panel which composed these Standards, either. According to the Preface to this book, published by the American Bar Association in 1972, pages viii-x, the Honorable Mr. Justice Blackmun served

on the Committee until he joined the Supreme Court. Other members were: Chief Judge Edward Allen Tamm of the United States Temporary Emergency Court of Appeals, Judge Frank J. Murray, United States District Judge from Massachusetts, and Judge Aubrey E. Robinson, Jr., United States District Judge from the District of Columbia. Judge Murray was the Chairman.

Your Amicus Curiae has now come to the hard question, the nitty gritty. There has never been any doubt as to a judge's duty to avoid ex parte situations. The duty has been plain at least since 1924 when the first set of Judicial Canons was adopted by the American Bar Association. Your Amicus Curiae argues that the only reason for going to the work and effort of preparing a new set of Canons and also preparing a set of Standards of Conduct for Trial Judges was to secure more up to date, more complete and more hardhitting principles to guide the country's judiciary. All that is now left is to put them to work. Your Amicus Curiae argues that the only way to put them to work is to reverse cases when the record shows that these Canons and Standards have not been followed to the extent that the complaining party has not received an open, fair trial. Otherwise, they will amount to nothing besides trivial platitudes. Referring back to that Preface on page 55C, at the rear of Volume VI, Martindale-Hubbell Legal Directory, 1976 Edition, your Amicus finds that the Canons in the New Code of Judicial Conduct are mandatory. "The canons and text establish mandatory standards unless otherwise indicated." However, the facts are that the American Bar Association has no

teeth. It is up to the United States Supreme Court to put the teeth in.

The Judges of the United States Court of Appeals for the Fifth Circuit are fine, hard working, upright Judges. However, the opinion in the case of Howell v. Jones, 516 F.2d 53 does not measure up to the Constitutional requirements of Due Process of Law.

They decided the case of Howell v. Jones, supra, entirely on the strength of an *overruled* case, to-wit, i.e. United States v. Grinnell Corp. et al., 384 U.S. 563, 16 L.Ed.2d 778, 86 S.Ct. 1698. That case is dated in 1966 and Commonwealth Coatings Corp. v. Continental Casualty Co., supra, was decided in 1969. Therefore, *the first case has been overruled by the second case.*

That is, the second case *overruled* the first case unless the two cases are distinguishable. Your Amicus argues that there is a big enough distinction to drive the proverbial truck through. United States v. Grinnell, supra, is like the old Shadow radio show. The Defendants in that case claimed that there was evil lurking in the heart of the judge and the last your Amicus knew, a party has to prove what he has alleged. The Defendants alleged that the Judge was mad at them, that he didn't like them and that he was full of bile toward them but they fell down on their proof and that is all the case stands for.

In Commonwealth Coatings Corp. v. Continental Casualty Co., supra, the injured party didn't even claim

that the Judge was mad at them and they obviously didn't have to. What they did claim was that the Judge violated the Rules and Canons by failing to make a disclosure of his previous business dealings. They proved what they claimed and what they alleged and this was all they had to prove. They didn't have to go on and prove that the Judge did so because he was mad at them.

Your Amicus Curiae argues that when a Judge overrules a motion for continuance you don't have to prove that the Judge was "mad" at you or your client. All that has to be proved is that he made a mistake or indiscretion. The same applies when he refuses to let in your evidence or directs a verdict or anything else. It is always possible that he may have been as hot as a poker and just aching to pour it on you but you don't have to X-ray his mind and prove all that. All that has to be proved is that he made a mistake or indiscretion.

This Amicus Curiae is of the opinion that the Honorable Fifth Circuit Court jumped the track in its thinking in the case of Howell v. Jones, supra. The Canons of Ethics naturally provide that the judge is not supposed to get mad, angry or upset with any party but this is beside the point, because neither Petitioner Howell nor the injured party in Commonwealth Coatings Corp. v. Continental Casualty Co., supra, made that type of claim. The judicial officer in these cases violated an entirely different Canon of Judicial Ethics and an entirely different Standard of Trial Court Conduct. These "judges" failed to disclose their dealings with the other side of the case. This is a completely separate

violation and an entirely different case. Evil motives are beside the point. All that is necessary is to prove that the Judge made a mistake by doing so. His motives are just as immaterial in this instance as if he refused to strike the prosecutor's brother-in-law off the jury panel. You don't have to X-ray the Judge's heart and mind and prove why he did it. All you need to prove is that he did it.

If the opinion in the Howell case is to be adopted as the Law of the Land, then the Canons of Judicial Conduct, Canon III, Article A, Section (4) and the Standards of Criminal Justice, Standards 1.2, 1.5 and 1.6 have, for all practical intents and purposes will have been held for naught.

Your Amicus Curiae has not made a personal attack on Judge Holland, nor intends to do so. Judges, every one of them, are human beings. Human beings all have their failings - - they all make mistakes. When judges quit making mistakes, we won't need any more appeals courts. If people would quit making mistakes, we could get by without any courts at all and very few lawyers.

The case is basically a simple one. Judge Holland made a mistake. Mistakes such as this can either be condoned or they can be corrected. There is no way to split the difference. The only way to give Petitioner Howell a fair trial is to reverse and start over again. However, your Amicus Curiae argues that the question goes substantially further than this. The only way to see

to it that such mistakes are not repeated is to put some teeth into these fine Canons and Standards which have been adopted by the outstanding committees of the American Bar Association.

When police officers fail to obtain a search warrant, the United States Supreme Court has held that the evidence seized by them must be thrown out. Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684. It doesn't make any difference even if the evidence laying out on the table proves the defendant guilty beyond any shadow of doubt. The only way to see to it that police officers do not repeat their mistakes is to reverse the case.

Likewise, when the police failed to warn the accused of his rights, the confession must go out of the case. The rule prevents the police from continuing to make the mistake of failing to give the proper warnings. Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974.

The United States Supreme Court has also held that in order to prevent the mistake of allowing arresting officers who are going to testify from mingling with the jurors, the case must be reversed even where no prejudice is shown. Turner v. Louisiana, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546. Whoever acts as baliff in charge of the jury is generally within the control of the Judge. This case, therefore, is precedent for reversing cases on account of mistakes of the Judge in order to see to it that such mistakes are not repeated.

After a twelve man (or woman) Trial Court jury finds the Defendant guilty beyond a reasonable doubt, the State might argue pretty strongly that defective procedures in selecting a grand jury are moot, harmless, immaterial and irrelevant. However, the United States Supreme Court put this kind of argument to rest many years ago. The United States Supreme Court holds that whenever minorities have been systematically excluded from the grand jury, the case must be reversed. Alexander v. State of Louisiana, 405 U.S. 625, 31 L.Ed.2d. 536, 92 S.Ct. 1221. The logic behind the rule is that this is the only way to control the mistakes of the judge in permitting systematic exclusion practices to persist. The only way to put a stop to this kind of thing is to reverse the case where it happens.

Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 holds that the mistake of systematically excluding women from trial court juries requires the case to be turned around. What does the sex of the jurors have to do with the defendant's guilt or innocence? The United States Supreme Court answered the question by holding that its ruling was prophylactic. This is the only way to correct this type of mistake and see to it that it is not repeated.

Your Amicus could extend the list of prophylactic decisions practically ad infinitum but the point has been made. The prophylactic cases hold that whenever the Judge, the prosecutor or the police fail to observe minimum standards of conduct, the case must be reversed and a new trial ordered. The policy behind

them has been developed by the United States Supreme Court over a period of years. The only way to see to it that these mistakes are not repeated is to reverse cases when such conduct occurs.

CONCLUSION

We do not think that it is possible to peer into Judge Holland's mind for the purpose of finding out if he was influenced. The United States Supreme Court declared itself without ability to do so in Commonwealth Coatings Corp. v. Continental Casualty Co., et al., supra. The Supreme Court simply held that this kind of mistake; that is, the failure to make reasonable disclosure, warrants sending the case back for re-consideration. Obviously, the United States Supreme Court granted the certiorari and wrote the opinion for the purpose of improving the standards that apply to arbitration proceedings. The question presently before the United States Supreme Court is whether the Supreme Court is ready to apply the same measure to Trial Court Judges who make similar mistakes. The new Judicial Canons and the new Criminal Justice Standards provide the Supreme Court with all the tools that it needs. Even though those Canons and Standards have been declared to be "mandatory", Your Amicus Curiae argues that the American Bar Association has no power to put teeth in the Canons and Standards that it worked so hard to produce. It is up to the United States Supreme Court to put in teeth where teeth are needed. Either these new Canons and Standards will be enforced or they will fall into disuse and oblivion. There is only one proper choice.

Your Amicus Curiae, the Committee to Obtain a Fair Trial for Charles Ben Howell, respectfully argues that the Petition for Writ of Certiorari to the United

States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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January 30, 1976

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

NO. 75-953

CHARLES BEN HOWELL ..... *Petitioner*

v.

CLARENCE JONES, SHERIFF,
DALLAS COUNTY, TEXAS ..... *Respondent*

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner submits that the Fifth Circuit has not followed its own recent authority, decided only shortly before the decision of the case in bar, U. S. v. Huff, 512 F.2d 66 (5-Ga.1975). Held, where the sentencing judge considered an ex parte memorandum from the United States Attorney, the case must be reversed. Inasmuch as the violation of judicial ethics occurred at the sentencing stage, the reversal was limited to reversal for re-sentencing before another judge.

The case cannot be distinguished simply as a federal housekeeping decision because it was primarily grounded upon Haller v. Robbins,409 F.2d 857 (1-Me.1969), an identical situation complained of in habeas by a state prisoner. Undisclosed ex parte communications are violative of due process.

Nor can the case be distinguished because the indiscretion occurred at the sentencing stage rather than the guilt stage of a trial. If anything, the reverse should be true. It is established that a sentencing judge may consider a wide variety of matters. A trying judge deciding or even presiding over trial of the guilt stage is held strictly to the evidence duly admitted in open court.

See also, People v. Corelli, 343 N.Y.S.2d 555(A.D.1973) reversing a conviction because the judge failed to disclose that while serving as district attorney, he had presented other charges against the same defendant to the grand jury.

In the case at bar, the Fifth Circuit held by necessary inference that the petitioner was burdened to show that the judge was actually influenced. None of the ex parte cases so holds and, as a practical matter, the ruling makes relief from ex parte communications virtually impossible to obtain. See People v. Superior Court, 113 Ca.R.732 (Ca.Ap. 1974) holding that the existence of actual prejudice is almost impossible to prove; the law therefore gives relief from

situations creating the appearance of bias. Accord: Withrow v. Larkin, 421 U.S. 35 (1975).

Of course, petitioner cannot prove exactly what was said at that confidential meeting between the trying judge, the complaining judge and the special prosecutor for the simple reason that he was not permitted to even know that the meeting had taken place. Ex parte contacts are always carried out in a manner calculated to leave the opposing party in the dark that the communication has even been made.

What petitioner can prove, and easily so, is that this type of conduct has no place in our Anglo-American tradition of an adversary system of justice. Simple logic also proves that the only effective hope of curbing this type of conduct is not to gloss over the facts when the case reaches the appellate stage, but to hold accountable those who have participated in trifling with the chosen tribunal. Until the burden is put upon those who know the facts to affirmatively demonstrate the harmless nature of the occurrence, no relief can be had by the complaining party.

None of the foregoing authorities were included in the petition for certiorari and petitioner in the exercise of reasonable diligence did not discover them in time to so include them. They confirm that this case was incorrectly decided by the Fifth Circuitand that the error was of substance. The only effective method

of discouraging ex parte communications is to reverse the case when it occurs. Only the judiciary can police the judiciary. In this case, the lower courts have avoided the task. Will the Supreme Court of the United States avoid it also?

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the appellant, I hereby certify this petition for rehearing is presented in good faith and not for delay. I further certify that it is restricted to the grounds specified in Supreme Court Rule 58(2).

H. AVERIL SWEITZER